SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, PETITIONER,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY

No. 312

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS, PETITIONER,

vs.

BINSWANGER AND COMPANY

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1943.

—7745

[fol. 1] **IN SUPREME COURT OF ARKANSAS**

No. 6973

JOE HARDIN, Commissioner of Revenues, Appellant

v.

J. E. DILWORTH COMPANY, Appellee

Pulaski Chy. Clk. Frank H. Dodge, Ch., $11.50.

PRAYER FOR AND ALLOWANCE OF APPEAL—September 23, 1942

Comes the plaintiff herein and by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney.

Appeal granted Sept. 23, 1942.
C. R. Stevenson, Clerk, by Frank H. Cox, D. C.

[fol. 2] [Caption omitted]

[fol. 3] IN THE PULASKI CHANCERY COURT

No. 64347

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

J. E. DILWORTH COMPANY, a Corporation, Defendant

COMPLAINT—Filed March 11, 1942

I

The plaintiff, Joe Hardin, is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas.

II

Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two per cent (2%) on the gross

proceeds derived from all retail sales as defined in said act. The said tax was levied upon the purchaser, but said act provided that the retailer was to collect the tax and remit the same to the Commissioner of Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in interstate commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a Regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto, marked "Exhibit A" and made a part hereof.

Act 386 of 1941 became effective July 1, 1941, and repealed act 154 of 1937, as amended. It levied a tax of two per cent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempt. The tax was upon the purchaser but [fol. 4] the seller was required to collect and remit the tax to the Commissioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article No. 27, in substance the same as Regulation No. 16, theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation No. 27 is attached hereto, marked "Exhibit B" and made a part hereof.

III

The defendant, J. E. Dilworth Company, is a corporation, organized under the laws of the State of Tennessee, with its principal place of business in the city of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no sales offices, branch plants or other places of business in said State, but it engages in business activity as defined by Regulation No. 16, promulgated under act 386 of 1941. Its activity in Arkansas is as follows:

A. Orders for machinery and mill supplies are procured in Arkansas principally by two traveling representatives of defendant, both domiciled in the city of Memphis, Tennessee, and who, as traveling representatives, cover, in their regular routes of solicitation, states other than Arkansas. Machinery and mill supplies acquired by the defendant's

Arkansas customers are approximately eighty-six per cent (86%) for consumption and fourteen (14%) for resale. All orders are taken by said traveling salesmen subject to the approval and acceptance of the Memphis office, and the order-forms so specify. If the order is approved and accepted by the Memphis office, it is filled and shipped f. o. b. Memphis, Tennessee, title to the merchandise being relinquished upon delivery to a common carrier. The traveling representatives have no authority to, and do not, collect accounts, their express authority being specifically limited [fol. 5] to the solicitation of orders which must be subsequently approved and accepted by proper central office authorities. No title-retaining contracts or vendor's lien notes are maintained in the State of Arkansas, and the only recourse defendant possesses for the collection of its accounts is a claim for an open account receivable. The defendant is in the general Interstate Business.

B. Defendant receives orders by mail and telephone from customers in Arkansas which, if accepted, are filled and merchandise delivered to a common carrier in Memphis, the purchaser paying the freight.

C. The defendant company also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

IV

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in Paragraph III-C) and has demanded that the defendant company remit to him a tax of two per cent (2%) of the gross proceeds derived from all such sales, except those sales for resale or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him, and, in order to ascertain the amount of the taxes due by the [fol. 6] defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, J. E. Dilworth Company, be required to submit its records so that an accounting may be had of its sales to purchasers in the State of Arkansas, and that, upon such accounting, the amount of taxes due by the defendant company to the Commissioner of Revenues have judgment for and against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for plaintiff.

[fol. 7] EXHIBIT A TO COMPLAINT

Supplemental Regulation Arkansas Retail Sales Tax Law Sales in Interstate Commerce

Article 16

The Department of Revenues reserves the right to pass upon and determine each question regarding interstate commerce. If a ruling is desired as to whether or not the gross receipts of any given transaction are exempt under the Arkansas Sales Tax Law, the Department will make such ruling, provided all of the facts surrounding such transactions are submitted for consideration.

Sales of Property Originating in the State of Arkansas

A. Where tangible personal property is located within the State at the time of sale and pursuant to and as a part of the sale does not leave the State the sale is within the Arkansas Retail Sales Tax Law, irrespective of where the parties to the contract to sell are located, or the place where the contract was made or accepted or the purchase price paid. It is immaterial that the purchaser may, sub-

sequent to the sale, transport the property out of this State or use it in interstate commerce.

B. The tax does not extend to sales where the seller makes physical delivery of the goods sold to the consumer at a point outside of this State, when such goods are not to be returned to a point within this State. The tax does not apply to sales where the vendor by carrier or by mail delivers the goods sold from a point in this State to a point outside this State on order of buyer. In order to establish an exemption of the proceeds of such sales the seller will be required to retain for his records, and available for inspection, waybills, bills of lading, orders and other data [fol. 8] as evidence of such transactions. If the vendee is a carrier, delivery to vendee in this State will constitute a taxable sale in the State, irrespective of the nature of the bills of lading or other shipping date.

Sales of Property Originating in Other States

When tangible personal property is purchased for use or consumption in this State and (1) the seller engages in any business activity in this State, and (2) delivery is made in this State, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this State and shipped directly to the purchaser from the point of origin. (See McGoldrick v. Derwind-White Coal Company, Sup. Ct. of U. S., decided January 29, 1940, and companion cases; Graybar Electric Co. v. Curry, Alabama Sup. Ct., May 26, 1939, Aff'd. Sup. Ct. of U. S., Nov. 6, 1939.)

If the conditions above are met, it is immaterial (1) that the contract of sale is closed by acceptance outside the State, or (2) that the contract is made before the property is brought into the State, or (3) that the contract of sale purports to require transfer of possession of such property outside the State of Arkansas.

Delivery is held to have taken place in this State (1) when physical possession of the tangible personal property is actually transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails directed to the buyer within this State, or placed on board a carrier (FOB or otherwise) and directed to the buyer in this State.

Engaging in business in this State may include any of the following methods of transacting business: Maintaining directly, indirectly or through a subsidiary an office, [fol. 9] distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the State under the authority of the seller or its subsidiary, irrespective of whether such place of business, agent, salesman or solicitor is located in this State permanently or temporarily or whether such seller or subsidiary is qualified to do business in this State.

Sales by a jobber of materials ordered from an independent out-of-state manufacturer with delivery directly from the out-of-state manufacturer to the purchaser is a retail sale within the meaning of the act. (Hollis & Co. v. McCarroll).

Sales consummated as above stated are taxable whether the same originate in another State or a foreign country.

Z. M. McCarroll, Commissioner of Revenues for the State of Arkansas.

September 24, 1940.

[fol. 10] Exhibit B to Complaint

Article 27

When tangible property is purchased by any person or business in this State for any purpose other than for resale and (1) the seller is a corporation qualified to do business in this State, or the seller carries on any business activity in this State, and (2) delivery is made in this State, such sale is intra-state and subject to the Gross Receipts Tax.

The term "business activity" for the purpose of this Regulation means maintaining any office of any kind, warehouse or place of distribution, directly or indirectly, by means of a subsidiary and/or agency, or the maintaining of any other place, whether business location or otherwise, from which orders are solicited or taken or at which place employees, agents and/or solicitors have their headquarters, or the mere solicitation of any business in this State or the servicing of any property by any employee, agent or salesman, irrespective of whether a place of business is maintained, or if maintained, whether the place of business

is permanent or temporary and irrespective of the length of time of engaging in such business activity as herein defined.

For the purpose of this Regulation "delivery" is made in this State (1) when actual possession of the tangible personal property is transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails or on board a carrier (FOB or otherwise) and directed to the buyer in this State. In instances of sales under the conditions just recited it is immaterial that the goods were produced by the seller outside the State and shipped directly to the purchaser from the point of origin or that the contract of sale was closed by acceptance outside the State or that the contract was made before the property was brought into the State or that the buyer may [fols. 11-12] subsequently transport the property out of the State for use or consumption.

When tangible personal property is sold by sellers in this State and the seller is obligated to deliver the property to a point outside the State or to deliver it to a carrier or to the mail to be delivered to a point outside the State, the tax does not apply, such sales being sales in interstate commerce.

[File endorsement omitted.]

[fol. 13] In the Pulaski Chancery Court

[Title omitted]

Answer—Filed March 31, 1942

Comes the defendant, J. E. Dilworth Company, and by way of answer to the plaintiff's original complaint, respectfully shows to the court:

I

Admits the allegations contained in Paragraphs I and II of the complaint.

II

Admits the allegations contained in Paragraph III, except as to lines 6 and 7, wherein plaintiff alleges defendant

to be engaged in business activity as defined by Regulation No. 16, promulgated under act 386 of 1941, this allegation being specifically denied.

III

Admits the allegation contained in the first sub-paragraph of Paragraph IV of complaint.

Admits that plaintiff has no adequate remedy at law; therefore, admits the jurisdiction of the court but denies that plaintiff is entitled to an accounting, for the reason that defendant's business is not taxable, as alleged by plaintiff.

Denies the allegation contained in sub-paragraph III of Paragraph IV of plaintiff's complaint, the same, in substance, being plaintiff's prayer.

IV

[fol. 14] If sales were made to defendant's customers in Arkansas, they were consummated in Memphis, Tennessee, delivery of merchandise was made in Tennessee and such transactions are not taxable under act 154 of 1937, as amended by act 364 of 1939, or act 386 of 1941 and the regulations promulgated in connection therewith.

V

Regulation No. 16, promulgated under act 154 of 1937, as amended, and No. 27, promulgated under act 386 of 1941, in substance amount to an enlargement of the acts thereunder, a power expressly conferred upon the Legislature, alone, by the Constitution of 1874, and such regulations are, therefore, void.

VI

Acts 154 of 1937, as amended, and/or 386 of 1941, together with regulations pertaining thereto, in so far as they apply to defendant's transactions in Arkansas, are void as being contrary to and infringing upon the Commerce Clause of the Constitution of the United States, the same being Article 1, Paragraph VIII, and the Due Process Clause of the Constitution of the United States, the same being Amendment No. 14.

Wherefore, defendant prays that plaintiff's complaint herein be dismissed for want of equity; that it be expressly

adjudged and decreed that act 154 of 1937, as amended, and act 386 of 1941, together with the regulations promulgated in connection therewith, are unconstitutional and void as applicable to defendant's transactions in Arkansas as set out by the complaint; that defendant have judgment for its costs herein expended, and for all other proper and equitable relief.

J. Bred Brown, of Memphis, Tennessee; Allan Davis, [fols. 15-16] of Memphis, Tennessee; Bradley & Patten, of Little Rock, Arkansas, Solicitors for Defendant.

[File endorsement omitted.]

[fol. 17] IN THE PULASKI CHANCERY COURT

[Title omitted]

STIPULATION AS TO CERTAIN FACTS—Filed May 13, 1942

It is hereby stipulated and agreed between the parties plaintiff and defendant, through their respective counsel, that the statements hereinafter set forth may be taken as true upon trial of this cause, without prejudice to the right of either party to offer further evidence not inconsistent with the facts herein stipulated.

I

Defendants gross receipts from Arkansas Customers for the period September 24, 1940, to June 30, 1941, are as follows:

Total Receipts	$43,148.98	
Less Sales for Resale	1,546.06	
Balance		$41,602.92
Orders secured by traveling representatives, approved and accepted in Memphis and goods shipped FOB Memphis, Tennessee	$20,801.96	
Orders received by telephone and telegraph in Memphis, approved, accepted and filled in Memphis and shipped FOB Memphis, Tennessee	2,080.15	

Orders submitted by customers coming to Memphis and accepting delivery of merchandise in Tennessee but carried into Arkansas for consumption	10,400.00	
[fol. 18] Orders received by mail, approved, accepted and shipped in Memphis, FOB Memphis, Tennessee	8,319.83	
Total		$41,602.92

II

Defendant's gross receipts from Arkansas customers for the period July 1, 1941, to September 30, 1941, are as follows:

Total Receipts	$18,741.93	
Less Sales for Resale	5,760.01	
Balance		$12,981.92
Orders secured by traveling representatives, approved and accepted in Memphis and goods shipped FOB Memphis, Tennessee	$6,490.96	
Orders received by telephone and telegraph in Memphis, approved, accepted and filled in Memphis and shipped FOB Memphis, Tennessee	649.05	
Orders submitted by customers coming to Memphis and accepting delivery of merchandise in Tennessee but carried into Arkansas for consumption	3,245.48	
Orders received by mail, approved, accepted and shipped in Memphis, FOB Memphis, Tennessee	2,596.43	
Total		$12,981.92

It is expressly stipulated that the above figures being abreed upon by the parties hereto might be used by the

court in the assessment of sales and gross receipt taxes against the defendant if any be found to be due.

[fols. 19-20] Joe Hardin, Commissioner of Revenues of the State of Arkansas, by Elsijane Trimble, Attorney. J. E. Dilworth Company, a Corporation, by J. Fred Brown, Attorney.

[File endorsement omitted.]

[fol. 21] IN THE PULASKI CHANCERY COURT

No. 64347

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

J. E. DILWORTH COMPANY, a Corporation, Defendant.

DECREE—May 13, 1942

This cause came on regularly to be heard upon the original complaint of the plaintiff, together with the exhibits thereto attached, the answer of the defendant, the stipulation of the parties and upon the entire record and oral argument of counsel in open court, Leffel Gentry and Elsijane Trimble, for the plaintiff, and J. Fred Brown, for the defendant, from all of which it appears to the court as follows:

The allegations as set forth in the original complaint, and the exhibits thereto attached, admitted by the defendant, and all facts affirmatively alleged by the answer, not denied by the plaintiff's reply, together with the stipulation agreed upon by counsel and filed in connection herewith, are true and correct; from which the court finds that the plaintiff cannot require the defendant to collect and remit the Arkansas sales or gross receipts tax, and that the plaintiff cannot recover taxes from the defendant, as sought in the complaint.

It is, therefore, ordered, adjudged and the court does hereby declare and decree that the complaint of the plaintiff be and the same is hereby dismissed, and that he recover nothing from the defendant.

To which ruling of the court in dismissing plaintiff's complaint, exception was timely reserved by the plaintiff

and an appeal prayed to the Supreme Court, which was duly granted. May 13, 1942. (Chancery Record 120, p. 393).

[fol. 22] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 23] IN THE SUPREME COURT OF ARKANSAS

No. 6974

JOE HARDIN, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee.

Pulaski Chy. Clk. Frank H. Dodge, Ch. $11.50.

PRAYER FOR ALLOWANCE OF APPEAL—September 23, 1942

The plaintiff herein, by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney for Plaintiff.

Appeal granted Sept. 23, 1942.

C. R. Stevenson, Clerk, by A. G. Sadler, D. C.

[fol. 24] [Caption omitted]

[fol. 25] IN THE PULASKI CHANCERY COURT

No. 64278

JOE HARDIN, Commissioner of Revenues of the State of Arkansas, Plaintiff,

v.

REICHMAN-CROSBY COMPANY, a Corporation, Defendant

COMPLAINT—Filed February 26, 1942

1

The plaintiff is the duly appointed, qualified and acting Commissioner of Revenues of the State of Arkansas.

2

Act 154 of the acts of the General Assembly of 1937, amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two percent (2%) on the gross proceeds derived from all retail sales as defined in said act.

The said tax was levied upon the purchaser but, by the terms of said act, it was provided that the retailer was to collect the tax and remit the same to the Commissioner of Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in interstate commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto as "Exhibit A".

Act 386 of 1941 became effective July 1, 1941 and repealed act 154 as amended. It levied a tax of two percent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempted. The tax was upon the purchaser, but the seller was required to collect and remit the tax to the Commis-[fol. 26] sioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article numbered 27, in substance the same as Regulation numbered 16 theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation numbered 27 is attached hereto as "Exhibit B".

3

The defendant, Reichman-Crosby Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this State, but it engages in business activity as defined by Regulation numbered 16, promulgated under act 154 of 1937, as amended, and as defined by Article 27 of the Regulations promulgated under act 386 of 1941. Its manner of doing business in Arkansas is as follows:

a. It is engaged in the mill supply business and, for the most part, its sales are to consumers, but a small part of its business consists of sales to retailers for resale. It has several traveling salesmen or solicitors who travel out of Memphis and in the State of Arkansas and solicit orders in this State. All orders are taken by said traveling sales-

men subject to the acceptance at the home office of the company in Memphis, Tennessee, and the authority of such traveling salesmen is so limited. If the order is accepted by the company the goods are delivered to a common carrier f. o. b. Memphis, the customer pays the freight and the goods are consigned direct to the customer.

b. The company receives orders by mail and telephone from customers in Arkansas and if these orders are accepted the goods are delivered to a common carrier, consigned to the purchaser in Arkansas, f. o. b. Memphis, the purchaser paying the freight.

c. The defendant company also makes sales of goods or [fol. 27] merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

4

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in paragraph 3-c) and has demanded that the defendant company remit to him a tax of two percent (2%) of the gross proceeds derived from all such sales, except those sales for resale or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him and, in order to ascertain the amount of the taxes due by the defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, Reichman-Crosby Company, be required to submit its

records so that an accounting may be had of its sales to purchasers in the State of Arkansas and that, upon such accounting, the amount of taxes due by the defendant company to the Commissioner of Revenues be determined, and that the Commissioner of Revenues have judgment for against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for Plaintiff.

[fols. 28-30] EXHIBIT A TO COMPLAINT

Omitted. Printed side page 7 ante.

[fol. 31] EXHIBIT B TO COMPLAINT

Omitted. Printed side page 10 ante.

[fols. 32-33] [File endorsement omitted.]

[fol. 34] IN THE PULASKI CHANCERY COURT

[Title omitted]

ANSWER OF REICHMAN-CROSBY COMPANY, A CORPORATION—Filed April 1, 1942

Defendant, Reichman-Crosby Company, a Corporation, appears by its attorneys, Daggett & Daggett, of Marianna, Arkansas, and for answer to the complaint states:

The allegations of paragraphs One (1), Two (2) and Three (3) of the complaint are admitted but are insufficient, separately or collectively, in law or in fact, to constitute a cause of action against defendant.

For answer to paragraph Four (4) of the complaint, defendant states that the gross receipts from sales made by defendant to residents of Arkansas, in the manner set forth in the complaint, during the period from September

24, 1940, to July 1, 1941, and from July 1, 1941, to November 1, 1941, are shown in the following tabulated statement:

From September 24, 1940, to July 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesman or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis or consigned to the purchaser	$49,554.10
(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Reichman-Crosby Company and by it delivered to a common carrier, consigned to the purchaser	79,766.89
(3) Gross receipts from sales made to Arkansas residents who come to Memphis, pur- [fol. 35] chase the goods and take them away in their own trucks	17,990.90
(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for the purpose of resale	11,247.40

From July 1, 1941, to November 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser	37,676.89
(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to the Reichman-Crosby Company and by it delivered to a common carrier, consigned to the purchaser	60,648.14
(3) Gross receipts from sales made to Arkansas residents who come to Memphis, purchase the goods and take them away in their own trucks	13,678.79

(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for purpose of resale $8,569.85

Defendant further states that Item 4, in the sum of $8,569.85 includes a sale of goods made by defendant to Lawson M. Wilhoit, of LeGrange, Lee County, Arkansas, in the sum of $50, on mail order dated July 2, 1941, and that the said Lawson M. Wilhoit had not, on said date, applied for nor received the permit provided for, and required by, [fol. 36] act 386 of the acts of 1941, from the Revenue Department of the State of Arkansas, and did not so receive such permit until July 7, 1941.

By way of affirmative defense and in bar of the right of plaintiff to enforce and recover the tax herein sought to be enforced and recovered, defendant further says:

1. Act 154-1937, as amended by act 364-1939, and act 386-1941 are not applicable to sales of goods such as are alleged to have been made by defendant in the conduct of its business wholly in interstate commerce and are void as being contrary to and infringing on the Commerce Clause of the Federal Constitution, and that any endeavor on the part of plaintiff, in his official capacity, to enforce and collect the tax alleged to be due by defendant on sales of goods so alleged to have been made by defendant would constitute a burden on interstate commerce and constitute a violation of Section 9, Article I, of the Constitution of the United States.

2. Regulation 16, promulgated by the Commissioner of Revenues under act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, and Regulation Number 27, promulgated by the Commissioner of Revenues under act 386 of the acts of the General Assembly of 1941, are naught more than an attempt on the part of the Commissioner to levy and enforce a tax on the use of the property sold by defendant to residents of Arkansas and, therefore, constitutes an additional tax on the property itself, in violation of the uniformity provisions contained in Article XVI, Section 5, of the Constitution of Arkansas, 1874.

3. Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, was construed by the Supreme Court of Arkansas in Mann v. McCarroll, Commissioner, 198 Ark. 628, in which the court held that the provisions of said act, as amended, could not be extended to sales of personal property consummated in other states and subsequently delivered to [fol. 37] residents of Arkansas within the State of Arkansas. Defendant, therefore, pleads a vested right in such judicial construction of said act and says that the attempt of plaintiff to collect the tax sought to be collected from defendant herein, during the period between September 24, 1940, to July 1, 1941, is prohibited by the Fourteenth Amendment to the Constitution of the United States and by Section 8 of Article II of the Constitution of the State of Arkansas.

4. Act 386 of the General Assembly of 1941 is virtually a reenactment of act 154 of the acts of 1937, as amended by act 364 of the acts of 1939. Therefore, the judicial construction of the act of 1937 by this Court, in Mann v. McCarroll, must be deemed to be the legislative intent of act 386 of the acts of 1941, and said act 386 must be so construed.

5. Defendant further states that at all times during the period between September 24, 1940, to this date, it has not in anywise been engaged in an intrastate business in the State of Arkansas. To the very contrary, the only business it has conducted in the State of Arkansas has been interstate in character. All of the sales of goods, wares or merchandise made by defendant to residents of Arkansas have been made on contracts entered into and wholly performed in the State of Tennessee and without the State of Arkansas. And, therefore, the State of Arkansas is without power to tax a transaction, contract or alleged sale of goods, wares or merchandise made by defendant beyond the territorial limits of the State of Arkansas.

Premises considered, defendant prays that it be discharged with its costs herein expended, and for all other proper and equitable relief.

Respectfully submitted, Daggett & Daggett, by W. H. Daggett.

[fols. 38-39] [File endorsement omitted.]

[fol. 40] IN THE PULASKI CHANCERY COURT

No. 64278

JOE HARDIN, Commissioner of Revenues, State of Arkansas, Plaintiff,

v.

REICHMAN-CROSBY COMPANY, Defendant

DECREE—May 13, 1942

On this day plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, appeared by his attorneys, Leffel Gentry and Elsijane Trimble; and defendant, Reichman-Crosby Company, appeared by attorneys Daggett & Daggett. Thereupon, this cause was submitted to the court on the complaint of plaintiff and the answer of the defendant thereto.

On the facts alleged in the plaintiff's complaint, admitted in the answer of the defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.

Therefore, it is by the court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed.

To the ruling and action of the court in dismissing the complaint of the plaintiff, exceptions were taken by plaintiff and an appeal prayed to the Supreme Court, which is granted. May 13, 1942. (Chancery Record 120, p. 394.)

* * * * * * * *

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF ARKANSAS

No. 6973

MURRAY B. MCLEOD, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH COMPANY, Appellee

No. 6974

MURRAY B. MCLEOD, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee

No. 6975

MURRAY B. MCLEOD, Commissioner of Revenues, Appellant,

v.

BINSWANGER & COMPANY, Appellee

MOTION TO SUBSTITUTE AS PLAINTIFF (APPELLANT) MURRAY B. MCLEOD, COMMISSIONER OF REVENUES, SUCCESSOR IN OFFICE TO JOE HARDIN, COMMISSIONER OF REVENUES, AND TO CONSOLIDATE THE ABOVE CAUSES

Comes Murray B. McLeod, Commissioner of Revenues of the State of Arkansas and states that he is successor in office to Joe Hardin, Commissioner of Revenues of the State of Arkansas, and moves that he be substituted as the party plaintiff (appellant) in the above causes.

It is further moved that the above causes be consolidated for the purpose of argument, submission and decision by this Court for the reason that issues in each of said causes are identical and that the facts in each are the same with one minor exception which will clearly appear in the record and which will be pointed out in the briefs and argument.

Leffel Gentry, Attorney for appellant.

[fol. 43] IN SUPREME COURT OF ARKANSAS

Appeal from Pulaski Chancery Court

No. 6973

JOE HARDIN, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH, et al., Appellees

and

No. 6974

JOE HARDIN, Commissioner of Revenues,

v.

REICHMAN-CROSBY COMPANY

and

No. 6975

JOE HARDIN, Commissioner of Revenues,

v.

BINSWANGER & COMPANY

ORDER GRANTING MOTION TO SUBSTITUTE AND CONSOLIDATE—January 25, 1943

On motion of the appellant, Murray B. McLeod, as Commissioner of Revenue, is substituted as appellant in place of Joe Hardin; and said causes are by the court consolidated for the purpose of briefing and submission.

[fol. 44] IN SUPREME COURT OF ARKANSAS

Appeal from Pulaski Chancery Court

No. 6973

MURRAY B. MCLEOD, Commissioner of Revenues, Appellant,

v.

J. E. DILWORTH COMPANY, Appellee

and (Consolidated Cases)

No. 6974

MURRAY B. MCLEOD, Commissioner of Revenues, Appellant,

v.

REICHMAN-CROSBY COMPANY, Appellee

Appeal from Pulaski Chancery Court

DECREE—April 26, 1943

These causes came on to be heard upon the transcript of the record of the chancery court of Pulaski County and were argued by solicitors, on consideration whereof it is the opinion of the court that there is no error in the proceedings and decree of said chancery court in this cause.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellant all their costs in this court in this cause expended.

[fol. 45] IN THE SUPREME COURT OF ARKANSAS

MCLEOD, Commissioner of Revenues,

v.

J. E. DILWORTH COMPANY and REICHMAN-CROSBY COMPANY,

OPINION—April 26, 1943

MCFADDIN, J.:

These cases involve the retail sales tax law (Act 154 of 1937) and the gross receipts tax law (Act 386 of 1941).

Appellee, J. E. Dilworth Company, is a corporation organized under the laws of Tennessee, with its home office and place of business in Memphis, Tennessee. It is not

qualified to do business in Arkansas, and has no sales office, branch plant, or other place of business in this State. Orders for its machinery and mill supplies are procured in Arkansas by two traveling representatives (both domiciled in Memphis). The orders are subject to the approval of the home office. When the order is approved in Memphis, the merchandise is shipped f. o. b. Memphis, title to the merchandise being relinquished upon delivery to the common carrier. The traveling representatives do not collect any money. Appellee also receives orders by mail and telephone from Arkansas customers, which orders are accepted in Tennessee, and merchandise delivered to a common carrier in Tennessee with no title retained. The appellee is engaged in the general interstate business. Arkansas customers sometimes go to the office of the company in Memphis and buy goods direct, loading the same on the purchaser's truck and bringing the merchandise back to Arkansas.

The appellee, Reichman-Crosby Company, is likewise a corporation organized under the laws of Tennessee, with its principal place of business in Tennessee; and its business, in all instances, is conducted and handled exactly as the business of the J. E. Dilworth Company, as above recited.

The Commissioner of Revenues of the State of Arkansas [fol. 46] filed separate suits against the two appellees in the Pulaski Chancery Court alleging in each suit that the respective appellee, by reason of the transactions involved—that is, the traveling salesmen soliciting orders and the appellee shipping the goods to purchasers f. o. b. Memphis—was liable to the State of Arkansas for the retail sales tax or the gross receipts tax of two per cent, as hereinbefore mentioned. The Commissioner of Revenues, in filing suit in the Pulaski Chancery Court demanded that the defendants (appellees) severally furnish information as to the amount of the sales mentioned herein so that the Commissioner might levy the tax.

The appellees severally entered appearance, answered the complaint and furnished the requested information; but all the time contended that the tax could not be assessed, because the sales were consummated in Tennessee and delivery of merchandise was made in Tennessee, and the transactions were not taxable by the State of Arkansas

under the acts here involved. The appellees contended that the legislative acts of the State of Arkansas and the regulations pertaining thereto, in so far as they involved appellees' transactions, were void, as being contrarary to and infringing upon the Commerce Clause of the Constitution of the United States (Article I, paragraph 8) and the Due Process Clause of the Constitution of the United States (Amendment 14).

The chancery court made a finding that the Commissioner of Revenues could not require the appellee companies to collect and remit the Arkansas sales tax or gross receipts tax, and that the Commissioner of Revenues could not recover taxes from the appellees in either of these cases. Accordingly, the chancery court dismissed the complaints and these appeals followed.

The legal questions in these appeals are:

(1) Whether these cases are ruled by Mann v. McCarroll, [fol. 47] 198 Ark. 628, 139 S. W. 2d 721.

(2) Whether the decision of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. Ed. 565, justifies this Court in sustaining the tax here sought to be imposed notwithstanding the decision in Mann v. McCarroll, supra.

1. In the briefs and in the oral argument, there was considerable discussion of the extent and limits of the holding of this court in Mann v. McCarroll, supra, so a review of that case is essential at the outset.

In Mann v. McCarroll, the plaintiffs sought to enjoin the Revenue Commissioner from collecting sales tax under act 154 of 1937. The chancery court sustained a demurrer and dismissed the complaints. On appeal, the appellants (plaintiffs and interveners below) presented the case to this court by using the dilemma form of argument; that is, on one horn of the delimma the appellants argued that if the tax be a "use" tax, then the tax would be unconstitutional, arguing that the State could not impose a "use" tax; and on the other horn of the delemma, the appellants argued that if the tax be a "sales" tax: then it would be a burden on interstate commerce and unconstitutional and void under the facts and circumstances in that particular case.

In the opinion, this court explored the first horn of the delemma, and held that the tax was not a use tax, saying: "We are, therefore, of the opinion that this sub-division does not levy or impose a use tax and until such tax is levied and imposed, of course, the question does not arise as to its validity, whether it be a property tax or otherwise." That conclusion ended the use tax argument.

Whether a "use tax" is constitutional or unconstitutional was not there decided; and Mann v. McCarroll does not foreclose the question—which is still open before this [fol. 48] court—as to whether a use tax is constitutional; and any statement therein to the contrary is dicta. We point this out so that the dicta in one decision will not be seized on as the *ratio decidendi* in the next decision; and we point this out for the further reason that no constitutional question is ever to be considered as decided in any case unless that question is necessary for decision in this case.

The second horn of the dilemma presented to the court in Mann v. McCarroll was that if the tax was a sales tax it was a burden on interstate commerce under the facts there involved. This court said:

"Substantially the appellee argues that no sales tax could be levied on a sale made in another state which was thereafter to be brought into the State; that such a tax, that is a sales tax, on a sale made in another jurisdiction would be an unwarranted burden on interstate commerce in violation of the commerce clause of the United States Constitution, and, therefore, invalid."

The court then analyzed subdivision F of Section 4 of the act (being the section urged by the appellee therein as distinguishing the tax from a sales tax) and said:

"The purpose of the said sub-division (F) aforesaid, is valid beyond a question if it be treated purely as part of the machinery to aid in the collection of a sales tax, and not in fixing liability upon property not subject thereto."

The court thus held the tax was a sales tax and void under the Commerce Clause of the Constitution of the United State in so far as the transactions therein were concerned.

The facts in the cases at bar are substantially the same—so far as the interstate commerce characteristics—as in Mann v. McCarroll, therefore, we now hold that the transactions here involved occurring under act 154 of 1937, and

prior to the effective date of act 386 of 1941, are directly [fol. 49] ruled by Mann v. McCarroll; and therefore not subject to the tax.

The appellant urges that the tax levied by the gross receipts tax act of 1941 is more than a sales tax, but we cannot agree with that contention.

The tax provided by act 154 of 1937 is commonly referred to as the retail sales tax. Since the enactment of act 386 of 1941, the tax has been legally called "gross receipts tax." Both taxes are generally referred to as the "sales tax." Whatever name may be given to the tax levied in either of the acts, the type of the tax provided is essentially the same. The only changes that have been made in the tax since 1935 have been with regard to the scope of the tax and the mechanics of the administration of the law and the collection of the tax. We think it is absolutely clear that the gross receipts tax of 1941, as here involved, is a retail sales tax, and therefore the same type of tax as was involved in Mann v. McCarroll.

2. The appellant argues that in Mann v. McCarroll we placed a construction on the power of the state to tax, which construction is too narrow, and that, since Mann v. McCarroll, the United States Supreme Court has rendered its decision in the Berwind-White Coal case (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. 33; 84 L. Ed. 565). In effect, the appellant argues that on the strength of the Berwind-White Coal case, we should now overrule our own case of Mann v. McCarroll in favor of a broader taxing desire.

It is our conclusion that the Berwind-White Coal case does not go as far as the appellant contends, and that it introduces no new feature into the law regarding interstate commerce, as previously declared. In the Berwind-White Coal case there was involved a retail sales tax of New York City. The Berwind-White Coal Mining Company, a Pennsylvania corporation, was engaged in the production of coal from its mines in Pennsylvania, and it sold the coal [fol. 50] to consumers and dealers. It maintained a sales office in New York City. All the sales contracts with the New York customers involved in that case (with two exceptions not germane) were entered into in New York City, and required delivery of the coal by the Berwind-White Coal Mining Company to the purchasers in New York City. In other words, there was a place of business in New York

City and a delivery in New York City; and therefore the tax of New York City was upheld. The United States Supreme Court, speaking by Chief Justice State, said:

"The like taxation of property, shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use, or withdrawal for use, by the consignee after the interstate journey has ended is not precluded."

The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City whereas, in the cases at bar, the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains, that, in cases of this type, delivery to the carrier is delivery to consignee. We hold that the Berwind-White Coal case affords the appellant no ground for asking an overruling by this court of Mann v. McCarroll.

The fact that the appellees have traveling salesmen who come into this State to solicit orders is not sufficient to [fol. 51] take the transaction out of interstate commerce. The sale is not made when the traveling man takes the order, but when the order is accepted and the goods are loaded f. o. b. cars in Tennessee. Furthermore, the Crenshaw case (Crenshaw v. Arkansas, 227 U. S. 389, 57 L. Ed. 565, 33 Sup. Ct. Rep. 294) is adverse to the contention of the appellant herein. Our attention has been called to the cases of Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 85 L. Ed. 888, and Nelson v. Montgomery Ward & Co., 312 U. S. 372, 85 L. Ed. 897, as instances where corporations were required to collect a tax for goods sold and used in the taxing State; but there are two distinctions between these cases and the cases at bar: first, the tax there involved was a *use tax* and not a *sales tax;* and second, each company had an office in the State in which the tax was levied. Likewise, we point out that it was a *use* tax, and not a *sales* tax that was sustained in Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62; 83 L. Ed. 488.

To conclude, we hold herein: (1) that the tax here involved is a sales tax; and (2) that as a sales tax, it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in these cases.

It therefore follows that the decision of the chancery court was correct and it is hereby affirmed.

[fol. 52] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR REHEARING

The appellant respectfully petitions the court to grant a rehearing in the above causes for the following reasons:

1. The court was in error in concluding that the questions presented were "(1) Whether these cases are ruled by Mann v. McCarroll, 198 Ark. 628, 130 S. W. 2d 721; (2) Whether the decision of the United States Supreme Court in the case of McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 84 L. ed. 565, justifies this court in sustaining the tax here sought to be imposed notwithstanding the decision in Mann v. McCarroll, supra."

These were not the real issues in these cases. The real issues in these cases, as presented by the pleadings and the briefs of the respective parties, were: (1) Whether the acts under consideration intended to include transactions of the sort involved as being taxable; and (2) Assuming the transactions were intended to be taxed, whether such intent was beyond the power of the state, that is, whether the acts violated the state or federal constitution.

The court apparently concluded that the transactions were within the scope of the definition of the sales provided by the acts to be taxed, but further concluded that the tax could not be imposed and collected on the transactions involved because it would be a burden on interstate commerce and therefore prohibited by the federal constitution.

[fol. 53] Should the court adhere to its conclusion that the collection of the tax on these transactions is prohibited by the interstate commerce clause of the federal constitution,

it should nevertheless clarify its opinion to show clearly that its opinion affirming the decision of the lower court, holding that the Commissioner of Revenues cannot collect the taxes on the transactions involved, is based solely on the proposition that a sales tax laid upon a purchaser cannot be collected on transactions in interstate commerce.

2. The court was incorrect in holding that in the case of Mann v. McCarroll, 198 Ark. 628, it was held that the tax, provided by act 154 of 1937, could not be levied on transactions in interstate commerce.

In the case of Mann v. McCarroll, the court did not pass upon the question of whether the collection of the tax was a burden on interstate commerce. It is true, that in the action which was brought to restrain the Commissioner of Revenues the collection of taxes on the transactions there involved, it was alleged that the collection of the tax would be a burden on interstate commerce, but the Commissioner of Revenues conceded in that case that if no use tax was levied, then the tax could not be validly collected because it would be a burden on interstate commerce. The court in the present case quoted from Mann v. McCarroll in an effort to support its proposition, that in that case the court had held that the tax was a burden on interstate. The quotation is as follows: "Substantially the appellee argues that no sales tax could be levied on a sale made in another state which was thereafter to be brought into the state; that such a tax, that is a sales tax, on a sale made in another jurisdiction would be an unwarranted burden on interstate commerce in violation of the commerce clause of the United States Constitution, and, therefore, invalid." However, we call the [fol. 54] court's attention, as we did in our original brief, that this was an admission on the part of the Commissioner of Revenues for he was the "appellee" in that case. The language quoted, therefore, does not sustain the court's present conclusion, in its opinion in this case, that the collection of the tax on the transactions involved would burden interstate commerce.

3. The court was incorrect in saying:

"2. The appellant argues that in Mann v. McCarroll we placed a construction on the power of the state to tax, which construction is too narrow, and that, since Mann v. McCarroll, the United States Supreme Court has rendered its de-

cision in the Berwind-White Coal case (McGoldrick v. Berwind-White Coal Min. Co., 309 U. S. ee, 84 L. Ed. 565). In effect, appellant argues that on the strength of the Berwind-White Coal case, we should now over-rule our own case of Mann v. McCarroll in favor of a broader taxing desire."

In the appellant's original brief, it was stated that there could be no quarrel in the decision of the case of Mann v. McCarroll, except as to the obiter dictum relating to the constitutionality (under the state constitution) of a use tax. The appellant did say in its original brief, and now reiterates, that the Mann v. McCarroll case is not controlling in these cases under consideration because that case held only that act 154 of 1937 did not levy a use tax.

Further, the appellant does say that if it be conceded for argument sake that the Mann v. McCarroll case held that transactions of the sort involved could not be taxed because of the interstate commerce clause, (which was the conclusion of the previous Commissioners of Revenues), this conclusion has been denied by the Supreme Court of the United States in the case of Goldrick v. Berwind-White Coal Min. Co., 309 U. S. 33, 84 L. Ed. 565, and com-[fol. 55] panion cases.

4. The court was incorrect in holding that the facts in these cases distinguish them in principle from the Berwind-White Coal decision; and the court, in its opinion, entirely overlooked the decision of the Supreme Court of the United States in the case of McGoldrick v. A. H. Du Greiner, Inc., 309 U. S. 70, which case on its facts is almost on all fours with these cases (as was stated in appellant's original brief).

5. The court was incorrect in holding that the decision in the case of Crenshaw v. Arkansas, 227 U. S. 389, supported its conclusion that the collection of the tax on the transactions here involved was prohibited by the commerce clause of the federal constitution, since that case did not involve a tax laid upon the purchaser, such as the sales tax here involved, but rather involved an occupation or privilege tax for engaging in business.

6. The court was incorrect in stating that: "Appellant has cited us to the cases of Nelson v. Sears, Roebuck & Co.,

312 U. S. 359, 85 L. Ed. 888, and Nelson v. Montgomery Ward & Co., 312 U. S. 372, 85 L. Ed. 897, * * *."

The appellant did not cite these cases anywhere in his brief. The appelland did cite, and discuss on pages 80 and 81 of his brief, the case of Felt & Tarrant Manufacturing Company v. Gallagher, 306 U. S. 62, for the purpose of pointing out to the court that the Supreme Court of the United States had upheld the right of a state to require an out-of-state seller, having no place of business in the state, to collect a use tax and had said that this was not a burden on interstate commerce. And he pointed out that as to the question of requiring out-of-state seller to collect the tax, it made no difference whether the tax was a sales or use tax. This certainly could not be disputed.

[fol. 56] Wherefore, the appellant prays that the court grant a rehearing in these causes and that the decree of the lower court be reversed with direction to enter judgments for the Commissioner of Revenues.

Leffel Gentry, Attorney for appellant.

Certificate

I, Leffel Gentry, attorney for the appellant, hereby certify that I believe there is merit in this petition and it is not filed for the purpose of delay but in order that justice may be done.

Leffel Gentry.

[fol. 57] In Supreme Court of Arkansas

Order Denying Petition for Rehearing—May 31, 1943

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

No. 6973 Murray B. McLeod, Commr. v. J. E. Dilworth Company.

No. 6974 Murray B. McLeod, Commr. v. Reichman-Crosby Co.

[fol. 58] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 59] IN SUPREME COURT OF ARKANSAS

No. 6975

JOE HARDIN, COMMISSIONER OF REVENUES, Appellant,

v.

BINSWANGER & COMPANY, Appellee

Pulaski Chy. Clk. Frank H. Dodge, Ch.

PRAYER FOR AND ALLOWANCE OF APPEAL—Sept. 23, 1942

Comes the plaintiff herein and by his attorney, prays an appeal to the Supreme Court.

Leffel Gentry, Attorney.

Appeal granted Sept. 23, 1942.
C. R. Stevenson, Clerk
By Frank H. Cox, D. C.

[fol. 60] [Caption Omitted]

[fol. 61] IN THE PULASKI CHANCERY COURT

No. 64277

JOE HARDIN, COMMISSIONER OF REVENUES, Plaintiff,

v.

BINSWANGER & COMPANY, A CORPORATION, Defendant.

COMPLAINT—Filed Feb. 26, 1942

1

The plaintiff is the duly apointed, qualified and acting Commisioner of Revenues of the State of Arkansas.

2

Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, levied a tax of two per cent (2%) on the gross proceeds derived from all retail sales, as defined in said act. The said tax was levied upon the purchaser but, by the terms of said act, it was provided that the retailer was to collect the tax and remit the same to the Commisisoner of

Revenues. Prior to September 24, 1940, the Commissioner of Revenues had not interpreted the act to apply to sales in Interstate Commerce but, on said date, September 24, 1940, the Commissioner of Revenues promulgated a regulation requiring the collection and payment of the taxes on sales originating outside the State where the delivery of the tangible personal property was finally made to a purchaser at a point in the State of Arkansas. A copy of said Regulation is attached hereto as "Exhibit A".

Act 386 of 1941 became effective July 1, 1941, and repealed act 154 of 1937, as amended. It levied a tax of two per cent (2%) on the gross proceeds derived from all sales as defined in said act, except such sales as were specifically exempted. The tax was upon the purchaser but the seller was required to collect and remit the tax to the Commis- [fol. 62] sioner of Revenues. Simultaneous with the effective date of said act 386 of 1941, the Commissioner of Revenues, under authority of said act, promulgated Article numbered 27, in substance the same as Regulation numbered 16 theretofore in effect under act 154 of 1937, as amended. A copy of said Regulation, numbered 27, is attached hereto as "Exhibit B".

3

The defendant, Binswanger & Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this State but it engages in business activity as defined by Regulation numbered 16, promulgated under act 154 of 1937, as amended and as defined by Article 27 of the Regulations promulgated under act 386 of 1941. Its manner of doing business in Arkansas is as follows:

A. It is engaged in the mill supply business and, for the most part, its sales are to consumers, but a small part of its business consists of sales to retailers for resale. It has several traveling salesmen or solicitors who travel out of Memphis and in the State of Arkansas and solicit orders in this State. All orders are taken by said traveling salesmen, subject to the acceptance at the home office of the company, in Memphis, Tennessee, and the authority of such traveling salesmen is so limited. If the order is accepted by the company, the goods are delivered, in some instances,

to a common carrier f.o.b. Memphis, the customer pays the freight and the goods are consigned direct to the customer. In other instances, the goods are delivered to the purchaser in Arkansas by defendant's own conveyances.

B. The company receives orders by mail and telephone [fol. 63] from customers in Arkansas, and if these orders are accepted the goods are delivered, in some instances, to a common carrier f.o.b. Memphis, the customer pays the freight and the goods are consigned direct to the customer. In other instances, the goods are delivered to the purchaser in Arkansas by defendant's own conveyance.

C. The defendant company also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business in Memphis, which goods or merchandise are taken by the purchasers into the State of Arkansas for use or consumption.

4

The plaintiff, Commissioner of Revenues of the State of Arkansas, has demanded that the defendant report the gross proceeds derived from all of its sales in Arkansas since the date of September 24, 1940, not including that merchandise sold and delivered in Memphis to Arkansas purchasers (mentioned in paragraph 3-C) and has demanded that the defendant company remit to him a tax of two per cent (2%) of the gross proceeds derived from all such sales, except those sales for resale, or such other sales as may be specifically exempt by law, but the defendant company has failed and refused to make such reports or to pay the taxes demanded of it.

The amount of such sales as made by the defendant company during said period of time and the tax due the Commissioner of Revenues on such sales is unknown to him and in order to ascertain the amount of taxes due by the defendant company, an accounting is necessary; and, therefore, the plaintiff has no adequate remedy at law.

Wherefore, the plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, prays that the defendant, Binswanger & Company, be required to submit its records so that an accounting may be had of its sales to pur- [fol. 64] chasers in the State of Arkansas and that, upon such accounting, the amount of taxes due by the defendant

company to the Commissioner of Revenues be determined, and that the Commissioner of Revenues have judgment for and against said defendant company for such amount; and the plaintiff further prays for his costs and all other proper relief.

Leffel Gentry, Attorney for plaintiff.

[fols. 65-67] EXHIBIT A TO COMPLAINT OMITTED. PRINTED SIDE PAGE 7 ANTE.

[fol. 68] EXHIBIT B TO COMPLAINT OMITTED. PRINTED SIDE PAGE 10 ANTE.

[fols. 69-70] [File endorsement omitted.]

[fol. 71] IN THE PULASKI CHANCERY COURT

[Title omitted]

ANSWER OF BINSWANGER & COMPANY, A CORPORATION—Filed April 1, 1942

Defendant, Binswanger & Company, a corporation, appears by its attorneys, Daggett & Daggett, of Marianna, Arkansas, and for answer to the complaint states:

The allegations of paragraphs one (1) and two (2) and three (3) of the complaint are admitted but are insufficient, separately or collectively, in law or in fact, to constitute a cause of action against defendant.

For answer to paragraph four (4) of the complaint, defendant states that the gross receipts from sales made by defendants to residents of Arkansas, in the manner set forth in the complaint during the period from September 24, 1940, to July 1, 1941, and from July 1, 1941, to November 1, 1941, are shown on the following tabulated statement:

From September 24, 1940, to July 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser	$53,620.00

(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Binswanger & Company and by it delivered to a common carrier, consigned to the purchaser $2,105.33

(3) Gross receipts from sales made to Arkan- [fol. 72] sas residents who come to Memphis, purchase the goods and take them away in their own trucks 956.49

(4) Gross receipts from sales made in wholesale to retailers in the state of Arkansas said sales being made for the purpose of resale 68,511.00

From July 1, 1941, to November 1, 1941:

(1) Gross receipts from sales where the order is secured by traveling salesmen or solicitors of the company, where the order is accepted and goods shipped f. o. b. Memphis consigned to the purchaser 28,563.40

(2) Gross receipts from sales made by orders from Arkansas residents where the orders are telephoned or sent by mail to Binswanger & Company and by it delivered to common carrier, consigned to the purchaser 1,643.32

(3) Gross receipts from sales made to Arkansas residents who come to Memphis, purchase the goods and take them away in their own trucks 434.15

(4) Gross receipts from sales made in wholesale to retailers in the State of Arkansas, said sales being made for the purpose of resale 41,723.41

By way of affirmative defense and in bar of the right of plaintiff to enforce and recover the tax herein sought to be enforced and recovered, defendant further says:

[fol. 73] 1. Act 154-1937, as amended by act 364-1939, and act 386-1941 are not applicable to sales of goods such as are alleged to have been made by defendant in the conduct of

its business wholly in interstate commerce, and are void as being contrary to and infringing on the Commerce Clause of the Federal Constitution, and any endeavor on the part of plaintiff, in his official capacity, to enforce and collect the tax alleged to be due by defendant on sales of goods so alleged to have been made by defendant would constitute a burden on interstate commerce and constitute a violation of Section 8, Article I of the Constitution of the United States.

2. Regulation 16, promulgated by the Commissioner of Revenues under act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, and Regulation number 27, promulgated by the Commissioner of Revenues under act 386 of the acts of the General Assembly of 1941, are naught more than an attempt on the part of the Commissioner to levy and enforce a tax on the use of the property sold by defendants to residents of Arkansas and, therefore, constitutes an additional tax on the property itself, in violation of the uniformity provisions contained in Article XVI, Section 5, of the Constitution of Arkansas, 1874.

3. Act 154 of the acts of the General Assembly of 1937, as amended by act 364 of the acts of the General Assembly of 1939, was construed by the Supreme Court of Arkansas in Mann v. McCarroll, Commissioner, 198 Ark. 628, in which the court held that the provisions of said act, as amended, could not be extended to sales of personal property consummated in other states and subsequently delivered to residents of Arkansas within the State of Arkansas. Defendant, therefore, pleads a vested right in such judicial construction of [fols. 74-75] said act and says that the attempt of plaintiff to collect the tax sought to be collected from defendant herein during the period between September 24, 1940, to July 1, 1941, is prohibited by the Fourteenth Amendment to the Constitution of the United States, and by Section 8 of Article II of the Constitution of the State of Arkansas.

4. Act 386 of the General Assembly of 1941 is virtually a reenactment of act 154 of the acts of 1937, as amended by Act 364 of the acts of 1939. Therefore, the judicial construction of the act of 1937 by this court, in Mann v. McCarroll, must be deemed to be the legislative intent of act

386 of the acts of 1941, and said act 386 must be so construed.

5. Defendant further states that, at all times during the period between September 24, 1940, to this date, it has not in anywise been engaged in an intrastate business in the State of Arkansas. To the very contrary, the only business it has conducted in the State of Arkansas has been interstate in character. All of the sales of goods, wares or merchandise made by defendants to residents of Arkansas have been made on contracts entered into and wholly performed in the State of Tennessee and without the State of Arkansas. And, therefore, the State of Arkansas is without power to tax any transaction, contract or alleged sale of goods, wares or merchandise made by defendant beyond territorial limits of the State of Arkansas.

Premises considered, defendant prays that it be discharged with its costs herein expended; and for all other proper and equitable relief.

Respectfully submitted, Daggett & Daggett, by W. H. Daggett.

[File endorsement omitted.]

[fol. 76] IN THE PULASKI CHANCERY COURT

No. 64277

JOE HARDIN, Commissioner of Revenues, Plaintiff,

v.

BINSWANGER & COMPANY, Defendant

DECREE—May 13, 1942

On this day plaintiff, Joe Hardin, Commissioner of Revenues for the State of Arkansas, appeared by his attorneys, Leffel Gentry and Elsijane Trimble, and defendant, Binswanger & Company, appeared by attorneys, Daggett & Daggett. Thereupon, this cause was submitted to the court on the complaint of Plaintiff and the answer of defendant thereto.

On the facts alleged in plaintiff's complaint, admitted in the answer of defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.

Therefore, it is by the court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed.

To the ruling and action of the court in dismissing the complaint of the plaintiff, exceptions were taken by plaintiff and an appeal prayed to the Supreme Court, which is granted. May 13, 1942. (Chancery Record 120, page 394).

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] In Supreme Court of Arkansas

Decree—April 26, 1943

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County and was argued by solicitors; on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The facts relating to deliveries made by appellee in this State in its own conveyances, were not sufficiently developed for a decision of the case.

It is therefore ordered and decreed by the court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs; and that this cause be remanded to said chancery court with directions to develop the facts, and for further proceedings to be therein had according to the principles of equity, and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof.

[fol. 79] IN THE SUPREME COURT OF ARKANSAS

McLEOD, Commissioner of Revenues,

v.

BINSWANGER & COMPANY

OPINION—April 26, 1943

McFADDIN, J.:

The opinion delivered by this court today in cases No. 6973 (McLeod, Commissioner, v. J. E. Dilworth Company) and No. 6974 (McLeod, Commissioner, v. Reichman-Crosby Company) is ruling in this present case in every particular except one; and that one difference necessitates some additional consideration of this Binswanger case. The appellee, Binswanger & Company, is a corporation organized under the laws of Tennessee, with its home office and place of business in Nashville, Tennessee, and its business in all instances is conducted and handled exactly as the business of J. E. Dilworth Company (appellee in case No. 6973) and Reichman-Crosby (appellee in case No. 6974) except that in some instances the Binswanger Company delivered the goods purchased to the purchaser in Arkansas by its own conveyances.

The Commissioner of Revenues of Arkansas filed suit against the Binswanger Company just as he did against the J. E. Dilworth Company and Reichman-Crosby Company, but in the Binswanger case there was, in paragraph No. 3 of the complaint, an additional allegation to the effect that in some instances the goods purchased were delivered by the Binswanger Company to the purchaser in Arkansas by the Binswanger Company's own conveyances. The answer of the Binswanger Company admitted this allegation of delivery, but claimed the same was insufficient to differentiate it from the Dilworth case and the Reichman-Crosby case.

[fol. 80] Therefore, from the complaint and answer it appears that the Binswanger Company did solicit orders in Arkansas, and did make delivery to purchasers in Arkansas from the Binswanger Company's own conveyances. In this particular, and only to the extent of such deliveries, the rule in the Dilsworth Company case and the Reichman-Crosby Company case this day decided may not apply. The

Binswanger deliveries in Arkansas might be sufficient to differentiate the Binswanger case from Mann v. McCarroll, 198 Ark. 628, and might bring the Binswanger case into the rule announced by the United States Supreme Court in McGoldrick v. Felt & Tarrant Mfg. Co., 309 U. S. 70, 84 L. Ed. 584, 60 Sup. Ct. Rep. 404. No proof was taken as to how the deliveries were made. We are not able to determine whether the interstate journey had ended so that the sales tax could apply.

So we reverse and remand this case against Binswanger & Company to the chancery court in order that the facts may be developed concerning the delivery of goods in Arkansas, and for further proceedings by the chancery court not inconsistent with the opinion in the J. E. Dilsworth case, supra, and this case.

[fol. 81] In the Supreme Court of Arkansas

[Title omitted]

Petition for Rehearing

The appellant respectfully petitions the court to grant a rehearing in the above cause for the following reasons:

1 to 6, Incl.

The reasons heretofore assigned in petitions for rehearing in causes Numbers 6973 and 6974, companion cases to this one, are herewith assigned as reasons for the granting of a rehearing in this cause.

7

The court was incorrect in remanding this case with directions that the facts be developed concerning delivery of goods in Arkansas by means of appellee's own conveyances; and in not remanding the case with directions for the lower court to enter a judgment against the appellee for the amount of taxes as may be determined to be due by reason of all deliveries made by the appellee by means of its own conveyances to purchasers in Arkansas.

There can be no further development of the facts concerning the method of delivery. The complaint alleged that

the merchandise was delivered by means of appellee's own conveyances and this was admitted by the answer. The extent and amount of the tax involved in these transactions necessarily would be determined upon remand of the cause with directions to enter judgment after ascertainment of these facts.

[fol. 82] Wherefore, the appellant prays that a rehearing be granted in this cause and that the decree of the lower court be reversed with directions to enter judgment against the appellee for the taxes on all transactions here involved; or, at least, that, as to the merchandise sold by appellee and delivered in its own conveyances, the lower court be directed to enter judgment that may be determined from the facts which may be offered in evidence as to the extent of these transactions and the amount of the tax due.

Leffel Gentry, Attorney for appellant.

I, Leffel Gentry, Attorney for the Appellant, hereby certify that I believe there is merit in this petition and it is not filed for the purpose of delay but in order that justice may be done.

Leffel Gentry.

[fol. 83] In Supreme Court of Arkansas

Order Denying Petition for Rehearing—May 31, 1943

Being fully advised, the petitions for rehearing in the following causes, are by the court severally overruled, viz:

• • • • • • •

No. 6975 Murray B. McLeod, Commr. v. Binswanger & Company

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] Supreme Court of the United States

Order Allowing Certiorari—Filed October 25, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas,

Petitioner,

vs.

J. E. DILWORTH COMPANY and REICHMAN-CROSBY COMPANY.

No. 312

MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas,

Petitioner,

vs.

BINSWANGER AND COMPANY.

PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

Leffel Gentry,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Petitioner,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY.

PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable Harlan F. Stone, Chief Justice, and the Honorable Associate Justices, of the Supreme Court of of the United States:

The petitioner, Commissioner of Revenues of the State of Arkansas, respectfully petitions that a Writ of Certiorari be issued in this cause to the Supreme Court of Arkansas, and in support thereof respectfully submits the following matters:

Statement of the Case.

The Commissioner of Revenues of the State of Arkansas brought separate suits against J. E. Dilworth Company and

Reichman-Crosby Company of Memphis, Tennessee, to require them to collect and pay to the Commissioner of Revenues the sales tax levied by Act 154 of the Acts of the General Assembly of Arkansas for the year 1937, as amended, and similarly to collect and pay the sales or gross receipts tax levied by Act 386 of the Acts of the General Assembly of Arkansas for the year 1941 (which latter act repealed Act 154 of 1937 as amended (R. 1-4, 12-15). The cases were consolidated for trial (R. 20-21).

According to the facts admitted by way of answer or by stipulation: Each of the defendants (in the separate cases) are foreign corporations, not qualified to do business in Arkansas and having no place of business here. Orders for merchandise are taken by traveling salesmen from customers in Arkansas, subject to acceptance by the company at Memphis, and orders are received by mail and telephone at Memphis from customers in Arkansas. When these orders are accepted the merchandise is shipped by common carrier direct to the purchaser in Arkansas, f. o. b. Memphis, purchaser paying the freight (R. 7-9; 9-11; 15-18).

The tax sought to be collected is two per cent (2%) of the proceeds derived by the defendants from sales to purchasers in Arkansas where delivery was finally made to to the purchasers in Arkansas (R. 1-4, 12-15).

The regulations of the Commissioner of Revenues providing for the collection of the tax under each of the pertinent acts are set forth at length in the appendix to the brief in support of this petition.

The defense of each of the parties was as follows:

(1) The regulation of the Commissioner of Revenues of Arkansas providing for the collection of the tax was beyond the scope and intent of either of the acts under which the taxes were sought to be collected, and therefore the regulation was invalid and the Commissioner of Revenues was

without authority under either of said acts to collect the taxes on transactions of the sort involved.

(2) The collection of the tax was a violation of the Constitution of the State of Arkansas.

(3) The collection of the tax was a violation of the Commerce Clause and the Due Process Clause of the Constitution of the United States (R. 7-9; 15-18).

Upon trial of these causes in the lower court, a decree was rendered dismissing the complaints of the Commissioner of Revenues in each of the cases (R. 11-12; 19).

Upon appeal of the causes to the Supreme Court of Arkansas, the decision of the lower court was affirmed and petition for rehearing denied (R. 22; 31). The decision was predicated upon the conclusion of the court, stated in its opinion, that a sales tax could not be levied upon transactions of the sort here involved because it would be a burden on interstate commerce and therefore in violation of the Commerce Clause of the Constitution of the United States (R. 22-28). It is this conclusion which the petitioner seeks to have reviewed by this Honorable Court.

Statement of Basis of Jurisdiction of This Court.

The statutory provision which it is believed sustains the jurisdiction of this Court is Sec. 240 of the Judicial Code (28 U. S. C. A., Sec. 347).

The date of the decree to be reviewed is May 31, 1943 (date Petition for Rehearing was denied) (R. 31); and the opinion of the Supreme Court of Arkansas is attached to the printed record to be furnished with this application for Writ of Certiorari (R. 22-28).

Statement of Question Presented.

The sole question presented in these cases is whether the collection of the tax, levied by Act 154 of the Acts of the

General Assembly of Arkansas for the year 1937 and the tax levied by Act 386 of the Acts of the General Assembly of Arkansas for the year 1941, under the facts presented in these cases, is a burden on interstate commerce and therefore prohibited by the Commerce Clause of the Constitution of the United States.

Statement of Reasons Relied On for Allowance of the Writ.

I.

The decision of the Supreme Court of Arkansas is upon an important question of Federal law which has not been *directly* passed upon by this Court. The question is frequently presented in the administration by the Commissioner of Revenues of Arkansas of the tax acts under consideration and is similarly presented in the administration of similar acts in numerous states where sales tax laws have been enacted.

II.

The decision of the Supreme Court of Arkansas is in conflict with principles established by prior decisions of this Court.

Wherefore, it is respectfully prayed that the Writ of Certiorari be granted.

Leffel Gentry,
Counsel for Petitioner,
Boyle Bldg.,
Little Rock, Arkansas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 312

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Petitioner,

v.

BINSWANGER AND COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable Harlan F. Stone, Chief Justice, and the Honorable Associate Justices, of the Supreme Court of the United States:

The petitioner, Commissioner of Revenues of the State of Arkansas, respectfully petitions that a Writ of Certiorari be issued in this cause to the Supreme Court of Arkansas, and in support thereof respectfully submits the following matters:

Statement of the Case.

This case was tried, upon order of consolidation, with the cases of *Commissioner of Revenues of Arkansas* v. *J. E. Dilworth Company*, and *Commissioner of Revenues*

of Arkansas v. *Reichman-Crosby Company*, in which application for Writ of Certiorari has also been filed. The facts are the same as in those cases with the exception that in this case the merchandise sold, in some instances, was delivered to the purchasers in Arkansas in trucks owned and operated by Binswanger and Company (R. 33, 35). The Supreme Court of Arkansas rendered a separate opinion in this case, and therefore, a separate record of this case was filed in this Court. However, as to all sales transactions except those of the kind just mentioned, the decision of the Supreme Court of Arkansas affirmed the decree of the lower court holding that the taxes could not be collected because it would burden interstate commerce and therefore violate the commerce clause of the United States Constitution (R. 40); and this review of that part of the decision, to the same effect as the decision in the other cases mentioned, is likewise sought.

The basis of this Court's jurisdiction, the question presented, the reasons relied on for the granting of the writ, and the argument and authorities in support of the petition are identical with those matters set forth in the petition and brief also filed in the other cases mentioned and to again set these forth in this petition would be needless repetition.

Wherefore, it is respectfully prayed that the Writ of Certiorari be granted.

Leffel Gentry,
Counsel for Petitioner,
Boyle Bldg.,
Little Rock, Arkansas.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Petitioner,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY.

No. 312

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Petitioner,

vs.

BINSWANGER AND COMPANY.

BRIEF IN SUPPORT OF PETITIONS FOR CERTIORARI.

Statement.

A full statement of the case is contained in the petitions for Certiorari, and therefore need not be repeated in this brief.

Summary of Argument.

I.

The Supreme Court of Arkansas, in its opinions, held that the collection of the taxes from the respondents would be a burden on interstate commerce and therefore was prohibited by the Commerce Clause of the Constitution of the United States.

II.

Collection of the taxes does not burden interstate commerce.

(a) A non-discriminatory tax may be levied on interstate commerce transactions.

(b) The tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption.

(c) Jurisdiction of the sellers is not a question in issue.

ARGUMENT.

I.

The Supreme Court of Arkansas Held That the Collection of the Taxes Would Burden Interstate Commerce.

In its opinion in these causes (m. op. Apr. 26, 1943), the Supreme Court of Arkansas held that the collection of the tax was prohibited by the Commerce Clause of the United States Constitution and in so holding relied upon its decision in the case of *Mann* v. *McCarroll*, 198 Ark. 628, 139 S. W. (2d) 721. In referring to the decision in that case, the court, in its opinion, said:

> "The court thus held the tax was a sales tax and void under the Commerce Clause of the Constitution

of the United States insofar as the transactions therein were concerned.

"The facts in the cases at bar are substantially the same—so far as the interstate commerce characteristics—as in Mann *v.* McCarroll, therefore we now hold that the transactions here involved occurring under Act 154 of 1937, and prior to the effective date of Act 386 of 1941, are directly ruled by Mann *v.* McCarroll, and therefore not subject to the tax." (m. op. Apr. 26, 1943; Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, *v.* J. E. Dilworth Company, and Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, *v.* Reichman-Crosby Company).

The court also stated in its opinion that the type of tax involved under Act 386 of 1941 was the same as the type of tax involved under Act 154 of 1937, as amended, and that the collection of the tax under that act was likewise prohibited by the Commerce Clause of the United States Constitution (m. op. Apr. 26, 1943; *Murray B. McLeod, Commissioner of Revenues of the State of Arkansas*, v. *J. E. Dilworth Company*, and *Murray B. McLeod, Commissioner of Revenues of the State of Arkansas*, v. *Reichman-Crosby Company*). The court concluded its opinion as follows:

"To conclude, we hold herein: (1) That the tax here involved is a sales tax; (2) that as a sales tax, it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in these cases."

II.

Collection of the Taxes Does Not Burden Interstate Commerce.

The court, in its opinion, relied upon the case of *Crenshaw* v. *Arkansas*, 227 U. S. 389, 57 L. Ed. 565, 33 S. Ct. 294, to support its conclusion that the collection of the taxes would be a burden on interstate commerce and refused to

follow the decisions of this Court in the following cases: *McGoldrick v. Berwind-White Coal Mining Company*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388; *McGoldrick* v. *Felt & Tarrant Mfg. Co.; McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U. S. 70; *Jagels, a fuel corporation, Petitioner, v. Taylor, Respondent,* 309 U. S. 619.

The tax involved in these cases is not a privilege or occupation tax. *Wiseman* v. *Phillips,* 191 Ark. 63; *Arkansas Power & Light Co.* v. *Roth,* 193 Ark. 1015 (See also the opinion in these cases sought to be reviewed). Therefore the *Crenshaw* case, which involved an occupation tax, is not an authority for the court's conclusion that the collection of the taxes in these cases would be a burden on interstate commerce.

(a) A NON-DISCRIMINATORY TAX MAY BE LEVIED ON INTERSTATE COMMERCE TRANSACTIONS.

In the case of *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* decided January 5, 1942, Vol. 86, No. 5, Adv. Op. 322, this Court said (P. 325):

> "And, similarly, this Court has sustained a non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce, but because the tax was not a prohibited regulation of or burden on that commerce. *Wiloil Corp.* v. *Pennsylvania,* 294 U. S. 169, 79 L. Ed. 838, 55 S. Ct. 358; *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 50, 84 L. Ed. 565, 572, 60 S. Ct. 388, 128 A. L. R. 876."

In the case of *McGoldrick* v. *Berwind-White Coal Mining Company,* cited *supra,* the decision of this Court sustaining the collection of the taxes rested fundamentally upon the proposition that a non-discriminatory tax might be levied on interstate commerce transactions.

> "If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce

from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of congressional action the commerce clause forbids. This Court has uniformly sustained a tax imposed by the state of the buyer upon a sale of goods, in several instances in the 'original package' effected by delivery to the purchaser upon arrival at destination after an interstate journey, both when the local seller has purchased the goods extra-state for the purpose of resale. *Woodruff* v. *Parham*, 8 Wall. (U. S.) 148, 19 L. Ed. 387; *Banker Bros. Co.* v. *Pennsylvania*, 222 U. S. 210, 56 L. Ed. 168, 32 S. Ct. 38, *supra; Wiloil Corp.* v. *Pennsylvania*, 294 U. S. 169, 79 L. Ed. 838, 55 S. Ct. 358, *supra; Graybar Electric Co.* v. *Curry*, 308 U. S. 513, ante, 437, 60 S. Ct. 139 (238 Ala. 116, 189 So. 186) November 6, 1939, and when the extra-state seller has shipped them into the taxing state for sale there, *Hinson* v. *Lott*, 8 Wall. (U. S.) 148, 19 L. Ed. 387, *supra; Sonneborn Bros.* v. *Cureton (Sonneborn Bros.* v. *Keeling)* 262 U. S. 506, 67 L. Ed. 1095, 43 S. Ct. 643. It has likewise sustained a fixed-sum license tax imposed on the agent of the interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose of sale. *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430, 15 S. Ct. 367, 5 Inters Com. Rep. 68; *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663, 25 S. Ct. 403; *Baccus* v. *Louisiana*, 232 U. S. 334, 58 L. Ed. 627, 34 S. Ct. 439; *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157, 40 S. Ct. 93.

"The only challenge made to these controlling authorities is by reference to unconstitutional 'burdens' on interstate commerce made in general statements which are inapplicable here because they are torn from their setting in judicial opinions and speak

of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned. See for example, *Galveston, H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638, *supra; Cooney* v. *Mountain States Teleph. & Teleg. Co.,* 294 U. S. 384, 79 L. Ed. 934, 55 S. Ct. 477; *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 80 L. Ed. 956, 56 S. Ct. 608. Others will presently be discussed. But unless we are now to reject the plain teaching of this line of sales tax decisions, extending back for more than seventy years from *Graybar Electric Co.* v. *Curry,* 308 U. S. 513, ante, 437, 60 S. Ct. 139, *supra,* decided this term, to *Woodruff* v. *Parham,* 8 Wall. (U. S.) 123, 19 L. Ed. 382, *supra,* the present tax must be upheld. As we have seen, the ruling of these decisions does not rest on precedent alone. It has the support or reason and of a due regard for the just balance between national and state power. In sustaining these taxes on sales emphasis was placed on the circumstances that they were not so laid, measured or conditioned as to afford a means of obstruction to the commerce or of discrimination against it, and that the extension of the immunity of the commerce clause contended for would be at the expense of state taxing power by withholding from taxation property and transactions within the state without the gain of any needed protection to interstate commerce. *Woodruff* v. *Parham, supra,* (8 Wall. (U. S.) 137, 140, 19 L. Ed. 386, 387); *Hinson* v. *Lott, supra* (8 Wall. (U. S.) 152 L. Ed. 388); *Sonneborn Bros.* v. *Cureton (Sonneborn Bros.* v. *Keeling) supra* (262 U. S. 513, 514, 521, 67 L. Ed. 1099, 1100, 1102, 43 S. Ct. 643); *Wiloil Corp.* v. *Pennsylvania, supra* (294 U. S. 174, 79 L. Ed. 840, 55 S. Ct. 358); cf. *Brown* v. *Houston,* 114 U. S. 622, 29 L. Ed. 257, 5 S. Ct. 1091, *supra; Henneford* v. *Silas Mason Co., supra,* (300 U. S. 583, 81 L. Ed. 819, 57 S. Ct. 524)."

McGoldrick v. *Berwind-White Coal Mining Company,* 309 U. S. 33, 84 L. Ed. 565, 60 S. C. 388, 128 A. L. R. 876.

The tax is not laid on the seller, but the seller acts only as the collecting agent, and insofar as concerns the question of whether the requirement that the seller collect the tax is an interference or burden on interstate commerce it makes no difference whether the tax required to be collected is a sales or a use tax, and this Court held in the case of *Felt & Tarrant Mfg. Co.* v. *Gallager,* 306 U. S. 62, that it was not a burden on interstate commerce to require an out of state seller to collect a use tax.

There is no discrimination against the sellers in these cases, as all sellers are required to collect the tax, subject only to the jurisdiction which the state may have obtained over the seller to enforce the requirements. The jurisdiction over these sellers will be discussed under sub-section (c) of this title of the argument.

(b) The Tax Is Conditioned Upon a Local Activity, Delivery of Goods Within the State Upon Their Purchase for Consumption.

In the case of *McGoldrick* v. *Berwind White Coal Mining Company,* cited *supra,* aside from its holding that a non-discriminatory tax might be levied on interstate commerce transactions, this Court, in its opinion, also held that under the facts there involved the tax was not laid upon interstate commerce transactions. The court said (P. 52):

> "Apart from these more fundamental considerations which we think are of controlling force in the application of the commerce clause, we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself."

It was further said (P. 57):

> "Here the tax is conditioned upon a local activity, delivery of goods within the State upon their purchase

for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power."

McGoldrick v. *Berwind-White Coal Mining Company*, 309 U. S. 33, 57, 84 L. Ed. 60 S. Ct. 388, 128 A. L. R. 876.

The same local activity, delivery of goods within the state upon their purchase for consumption, exists in these cases; and, as was indicated by the opinion of this Court in that case, the local activity relating to the securing of the order has no bearing on the interstate commerce question.

(c) Jurisdiction of the Seller Is Not a Question in Issue.

The respondents answered and defended the suits brought against them to enforce the collection of the tax and therefore there is no question in issue in these suits as to jurisdiction.

Conclusion.

The petitioner submits that the opinion of the Supreme Court of Arkansas in these cases holding that the taxes could not be collected because it would be a burden on interstate commerce is contrary to the principles announced by this Court in the decisions referred to, and for this reason that this Honorable Court should issue its Writs of Certiorari to the Supreme Court of Arkansas so that the opinion of the court may be fully reviewed.

Respectfully,

Leffel Gentry,
Counsel for Petitioner,
Boyle Bldg.,
Little Rock, Arkansas.

APPENDIX

APPENDIX.

Act 154 of 1937—Arkansas Retail Sales Tax Law.

An Act to provide for raising Revenue to Sustain the common schools, to provide free text books for the first eight grades thereof; to substitute homestead exemption taxes and to provide funds for library service and for the objects of the Welfare Commission by prescribing a [illegible] levying specific taxes; to provide for the ascertainment, assessment, and collection thereof; to make provision for the carrying out of the purposes of this act; to prescribe penalties for a violation thereof; and to provide for the distribution and the disposition of the monies raised under the provision of this act.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. Title. The title of this Act shall be, "The Arkansas Retail Sales Tax Law."

Section 2. Purposes. The purposes of this Act are to provide relief for Common Schools, to provide funds to buy free textbooks for the first eight grades thereof, to provide funds for circulating library service in connection with the public schools and funds to take the place of homestead exemptions, and to provide for the wards of the State who will receive support through the State Welfare Commission and for other worthy causes.

Section 3. Definitions. When used in this Act:

(a) The term "Person" includes any individual, firm, co-partnership, joint adventure, association, corporation, company, estate, trust or any other group or combination acting as a unit and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) 1. The term "sale at retail" shall mean any transaction, transfer, exchange, or barter by which is transferred

for a consideration the ownership of any personal property, thing, commodity and/or substance, and/or the furnishing or selling for a consideration any of the substances and things hereinafter designated and defined, when such transfer, exchange or barter is made in the ordinary course of the transferror's business and is made to the transferee for the consumption or use or for any other purpose than for resale. The term "sale at retail" includes conditional sales, installment lease sales, and any other transactions when the title is retained as security for the purchase price, but is intended to be transferred later. "Sale at retail" shall not include sales of materials for further processing.

(b) 2. The term "sale at retail" shall not include an isolated or occasional sale of tangible personal property, substance, or thing by a person not engaged in such business.

(c) The term "business" shall include all activities or acts engaged in by any person, or caused to be engaged in by him, with the object of gain or benefit or advantage, either direct or indirect. The term "business" shall not be construed in this Act to include occasional and isolated sales or transactions by a person who does not hold himself as engaged in business.

(d) The term "gross proceeds" shall mean the amount received in money, credits, property, or any other money's worth in consideration of sales at retail within this State, without any deduction on account of the cost of the property sold, the cost of materials used, or any other expense whatsoever, nor shall any deduction be allowed for losseses. Credit or refunds for returned goods may be deducted. "Gross proceeds" shall not include the price received for labor or services used in installing, applying, remodeling, or repairing the property sold.

(e) The term "retailer" shall mean any person, persons, partnerships, firm or corporation engaged in "sale at retail."

(f) The term "Commissioner" refers to the Commissioner of Revenues for the State of Arkansas.

(g) The term "Governmental agency" shall mean the State, any county, city, municipality, district or subdivision thereof.

(h) The use of the pronouns, "he, his, him or himself" shall be construed to refer not only to persons but to any, every and all partnerships, firms, and/or corporations coming within the purview of this Act.

(i) The test of a sale at retail is whether the sale is to a consumer for use and not for resale. Sales of goods which, as ingredients or constituents, go into and form a part of the tangible personal property for resale by the buyer are not within the Act; also sale of tangible personal property where other property is accepted as part of purchase price, such personal property so accepted to be resold, is not subject to tax; provided that in instances where public buildings are constructed the contractor so constructing said building shall be regarded as the consumer under the meaning of this Act.

Section 4. The Tax. There is hereby levied upon and shall be collected from all retail sales, as herein defined, a tax of two per cent (2%) of the gross proceeds derived from said sales.

The tax imposed by this section shall apply to:

(A) All sales at retail of tangible personal property.

(B) All retail sales at or by restaurants, cafes, cafeterias, hotels, dining cars, auctioneers, photostat and blueprint sales, funeral directors, and all other establishments of whatever nature or character selling for a consideration any property, thing, commodity, and/or substance.

(C) All sales of admission or admittance to athletic contests, theatres, both motion picture and stage performances, circuses, carnivals, dance hall and other places of amusement.

(D) All retail sales of electric power and light, natural and artificial gas, water, telephone use and messages and telegrams.

(E) Where there are adjoining cities or incorporated towns which are separated by a State line, the taxes and licenses to be paid by dealers in and on sales and services

in such adjoining city or incorporated towns on the Arkansas side of the State line shall be at the same rate as provided by law in such adjoining State, if any, not to exceed the rate provided in this Act.

(F) Every person, as defined in this Act, shall report to the Commissioner as a retail sale the use or consumption by him of anything on which the sales tax has not been paid under this Act which would have been levied had it been sold at retail in this State, and shall pay the sales tax thereon.

Section 5. Tax on credit merchants—cotton exempted. The tax imposed by this Act shall be in addition to any and all other taxes except as may herein be provided otherwise. Any person taxable under this Act, doing business wholly or partly on a credit basis may make application to the Commissioner for permission to prepare his returns on the basis of cash actually received. Such applications shall be granted by the Commissioner under such rules as he may prescribe. Any person making such application shall be taxable on all moneys collected during the period this Act is in force regardless of date of sale. Provided, however, nothing in this Act shall be construed as levying any taxes upon the gross proceeds received by any person whatsoever, from the sale of any cotton or seed cotton or lint cotton or baled cotton, whether compressed or not, or cotton seed in its original condition. Provided, further that nothing in this Act shall be construed as levying any tax upon the gross proceeds received by the breeder, grower, or producer of any milk, poultry, livestock, or agricultural or horticultural, product or commodity, from the first or initial sale of same, and providing that nothing in this Act shall be construed as levying a tax on the following: All agricultural production produced by farmers, while the said production is in their possession and being offered for sale by them, the following items being named herein: cotton, cotton seed, corn, wheat, oats, hay, sorghum, rice, sagrain, high-gear, strawberries, raspberries, peanuts, peas; furthermore, all horticultural products, namely: peaches, apples, pears, etc. Furthermore, all vegetables and eatables

produced on the farm by farmers. Furthermore, all livestock, namely: horses, mules, cattle, sheep, hogs, goats, etc. Furthermore, all poultry, namely, turkeys, chickens, ducks, and all other fowls so raised and the products of these fowls. Furthermore, all dairy products, namely: milk, in all of its forms and butter, and pecans, grapes, watermelons, cantaloupes, tomatoes, pumpkins. The naming of specific products herein as being exempt from the taxing provisions of this Act shall not be construed to exclude any other products coming within the meaning of general classes of products herein stated to be exempt.

Section 6. Administration Cost. The State Commissioner of revenues shall administer and enforce the assessment and collection of the taxes and penalties imposed by this Act. He may make and publish such rules and regulations, not inconsistent with this Act, as he may deem necessary in enforcing its provisions. Inasmuch as the tax herein provided will be inappreciable on single articles of small value, the tax on articles of larger value must be more or less approximate in order to equalize them. The Commissioner shall, therefore, prepare instructions to dealers by setting out to them suitable brackets of prices for applying the tax.

All forms necessary and proper for the enforcement of this Act shall be prescribed, printed and furnished by the Commissioner.

Section 7. Appropriation. The administration cost of this Act shall not exceed three per centum (3%) of the actual revenues collected.

Section 8. Unlawful to Divulge Information. It shall be unlawful for the Commissioner or any person having an administrative duty under this Act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any person selling at retail, or the amount or source of income, profits, losses, expenditures, or any other particular thereof set forth or disclosed in any return. Provided, however, that the Governor may authorize examinations of such returns by other State or County

Officers, by tax officers of other states or the Federal Government.

Section 9. Duty of Retailer to Collect and Account for Retail Sales Tax. The tax hereby imposed shall be collected by the retailer from the consumer; and on or before the fifteenth day of each month after the effective date of this Act, and on or before the fifteenth day of each calendar month thereafter, the retailer shall make a return or returns to the Commissioner of Revenues upon forms furnished by said Commissioner, said return or returns to be made under oath or affirmation by the retailer. The Commissioner shall prepare and distribute to all those engaging in retail sales as herein defined all necessary blanks and forms on which each return or returns are to be made.

Section 9-A. Remittance and Distribution. The person making the monthly return herein provided shall pay to the Commissioner the amount of taxes herein levied at the time of making such return. Of the monies received by the Commissioner on account of taxes collected under this Act he shall pay into the State Treasury to a fund known as the "Textbook Fund" seven per cent (7%) during the fiscal year 1937-38, until $350,000.00 shall have been paid in for said fiscal year; and thereafter seven per cent (7%) each fiscal year, until $350,000.00 shall have been paid in each year with which to furnish free textbooks for the first eight grades in the Common Schools. He shall, beginning with the calendar year 1938, pay into a fund known as "Homestead Tax Exemption Fund" eight per cent (8%) of the monies collected during each fiscal year, until $500,000.00 is paid into said fund each fiscal year hereafter, to be used to replace monies heretofore accruing to the different funds from homestead taxes, and to be distributed according to the statute on that subject. He shall pay into a fund known as the "Charitable Institutions Fund" ten per cent (10%) during each fiscal year, which fund is to be used for the purpose of maintaining the State Charitable Institutions. He shall pay into the State Treasury to the credit of the Welfare fund twenty-five (25%) per cent of the taxes collected under this Act and to the Common School fund fifty

(50%) per cent thereof; and any excess from the percentage allocated to the "Textbook Fund" and the "Homestead Exemption Fund" over the maximum sums up in this section for the benefit of said funds shall be divided as follows: Thirty-five per cent (35%) to the Welfare Fund and thirty-two and one-half (32½%) to a general property tax reduction fund, which fund is hereby created and seventeen and one-half per cent (17½%) to the common school fund, and fifteen per cent (15%) to counties to reimburse the general fund of counties in proportion to amounts allowed by the various county courts for the support of the County Agricultural Extention Service. Said monies are to be used only for the purposes for which collected and distributed. Provided that there may be appropriated from the said Common School Fund necessary funds to maintain a library service as provided by law. The monies paid into the Common School Fund shall be used only for the payment of warrants issued for the maintenance of schools and said library service, to be paid in order of registration as now provided by law.

Remittance of taxes imposed under this Act shall be made to the Commissioner by certified checks, cashier's checks, money orders or money.

Section 10. Retailer Responsible for Tax. Any retailer who shall neglect, fail or refuse to collect the tax herein provided upon any, every and all retail sales made by him, or his agents or employees shall pay the same himself, which said amount may be collected by distraint warrant as provided in this Act. Provided any retailer of a service of a continuous nature required by law or regulation of a state agency having jurisdiction shall have the right to discontinue service upon refusal of consumer to pay the sales tax thereon and shall report such refusal to the commission, and the commission shall assess the tax due directly against the consumer and shall proceed to collect such tax due by direct distrant upon the property of the consumer, or otherwise.

Section 11. Annual Return. On or before February first of each year each retailer in addition to the monthly

return, shall make an annual return in the form required by the Commissioner. He shall transmit the return to the Commissioner together with his remittance covering the tax due to and including the remittance for December. Such return shall be made under oath or affirmation on the form prescribed. The Commissioner may for good cause extend the time for making the annual return on the application of any person subject to the tax to fit the fiscal year used in the ordinary course of business.

Section 12. Penalities for Non-Payment. If the Commissioner has reason to believe, and does believe, that any return is incorrect, after notice to the person making the return and a hearing, he shall correct such return according to his best judgment and information, which return so corrected by the Commissioner shall be prima facie correct. If the tax or amount found to be due by the Commissioner is greater than the amount of tax or amount due under the return as filed, the person making such return shall pay the additional tax or amount as computed by the Commissioner within ten (10) days after notice of the amount of such additional tax or amount is mailed to such person. If the payment is not made within such ten (10) days a penalty of ten per centum (10%) and interest at the rate of one per centum (1%) for each month or fraction of a month calculated from the date of the mailing of such notice, shall be added to the amount of such additional tax or amount due by said person.

Section 13. Examine Books, Records, Etc. The Commissioner or his authorized agents may examine any books, papers, records, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made as required by this Act. If any person shall refuse to produce any book, record, paper, or other data pertaining to taxable sales when required to do so by the Commissioner or his authorized agent, such refusal shall be reported to the Attorney General or the Prosecuting Attorney who shall thereupon institute proceedings in the proper court of the county where such witness resides to compel obedience to any summons of the Commissioner or

his authorized agent; officers who serve summons or subpoenas, and witnesses attending shall receive like compensation as officers and witnesses in the justice of the peace courts; to be paid from the proper appropriation for the administration of this Act.

Section 14. Keep Records. Every person engaged in the business of selling at retail shall keep records and books of all such sales at retail, together with invoices, bills of lading, sales records, copies of bills of sales, and other pertinent papers and documents. Such books and records, and other papers and documents shall be subject to inspection by the Commissioner or his authorized agents and employees, at all times during business hours of the day.

Any person engaging or continuing in business as a retailer; and retailer and wholesaler or jobber shall keep his books so as to show separately the sales of each business. He shall consider as retail sales all sales made by him to any person other than a person purchasing for resale in the regular course of business or for processing. When his books are not so kept, all of his sales shall be regarded as retail sales.

Section 15. Exemptions. There are hereby specificially exempted from the taxes levied in this Act: (a) Retail sales which are prohibited from taxes by the Constitution or laws of the United States of America or by the Constitution of this State. (b) A portion of all retail sales on articles and/or commodities on which a State privilege tax or license is already collected. In this case the tax imposed in this Act shall be an amount equal to whatever is the excess above the already imposed privilege tax or license. (c) If the application of the tax provided in this Act on the retail sale of any article or commodity is found to be unconstitutional it is specifically understood that the validity of this Act shall be affected only as relates to said articles and will not affect the validity of the tax imposed on other articles in this Act.

Section 16: Deduction. A governmental agency may apply to the commissioner for refund of the amount of tax levied and paid upon sales to it for food-stuffs used for

free distribution to the poor and needy or to public penal and eleemosynary institutions.

Such refunds may be obtained only in the following manner and only under the following conditions:–

(a) On forms furnished by the Commissioner the governmental agency shall report monthly the total amount expended for foodstuffs for free distribution to the poor and needy or to public penal and eleemosynary institutions.

(b) On said forms the governmental agency shall separately list the persons making the sales to it, or to its order, together with the date of sales, and the total amounts so expended by the governmental agency.

(c) The governmental agency must prove to the satisfaction of the Commissioner that the tax has been paid on such sales.

(d) All hospitals and sanatoria operated solely for the treatment and care of sick and injured persons shall report monthly, on forms prescribed by the Commissioner, verified by the Superintendent of said institution, the total amount of all purchases of any and all articles or food, used and employed in the operation of such hospital or institution, and may obtain the refund herein provided for and shall obtain the refund in the same manner as is provided for in this section for governmental agencies.

Section 17. Advertising. It shall be unlawful for any retailer to assume or absorb the tax, or to advertise or hold out to the public or to any customer directly or indirectly that the tax, or any part thereof imposed by this Act will be assumed or absorbed by the retailer.

Section 18. Delinquent tax; Warrants; lien of tax. If any tax or amount imposed by this Act, or any portion of such tax or amount, be not paid within thirty days, after due, the same shall be considered, delinquent and the amount payable thereafter shall be the amount due with ten per cent (10%) for the first month and an additional penalty of one per cent (1%) per month until paid or collected and the Commissioner may, as soon as practicable

thereafter, issue a warrant under his official seal, directed to the Sheriff of any county of the States, commanding him to levy upon and sell any real and personal property of the person owing the same, found within his county for the payment of the amount thereof, with the added penalties, interest, and the cost of executing the warrant, and to return such warrant to the Commissioner and to pay to him the money collected by virtue thereof within thirty days from the date of the warrant. The Sheriff shall, within five days after the receipt of the warrant, file with the Circuit Court Clerk of his county a copy thereof, and thereupon the Circuit Court Clerk shall enter in the column for judgment debtors, the name of the person mentioned in the warrant, and, in proper columns, the amount of the tax due or portion thereof and interest and penalties for which warrant is issued, and the date when such copy is filed and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in any real property, chattels, real or personal property of the person, against which such warrant is issued, and such lien shall be preferred and superior to all mortgages or other liens, filed or recorded subsequent to the date such tax liens become effective. Such sheriffs shall thereupon proceed upon the same in all respects, with like effect and in the same manner prescribed by law in respect to executions issued against property upon the judgments of a court of Record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In case of failure of any sheriff to file copy of warrant with the Circuit Court Clerk as herein prescribed, a certified copy thereof filed by the State Commissioner of Revenues shall operate to the same effect as if same had been filed by the Sheriff.

Section 19. Action. (a) A right of action is hereby created to afford a remedy at law for any person aggrieved by the provisions of this Act; and in case of any such person resisting the payment of any amount found due, or the enforcement of any provision of such laws in relation thereto, such person shall pay the amount found due by the Commissioner and shall give the Commissioner notice, at

the time, of his intention to file suit for the recovery of the same; and upon receipt of such notice, the amount so paid shall be segregated and held by the Commissioner, for a period of thirty (30) days; and if suit be filed within such time for the recovery of such amount, such funds so segregated shall be further held, pending the outcome of such suit. If the person prevails, the Commisioner shall refund the amount to the claimant.

(b) This Section shall afford a legal remedy and right of action in any state or Federal Court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Act, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such actions, service of process upon the Commissioner shall be sufficient service and he shall be the sole, necessary, and proper party defendant in any such suit.

(c) This Section shall be construed to provide a legal remedy in the State or Federal Courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or in any case where jurisdiction is vested in any of the courts of the United States; provided that upon request of a person and upon proper showing by such person that the principle of law involved in and additional assessment is already pending before the courts for judicial determination, the said person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the Commissioner until the question of law involved has been determined by the Courts and shall then be disposed of as therein provided.

Section 20. Tax on Sales for Use Outside of State. Separate articles of merchandise, commodity or personal property sold at retail in this State for use outside of this State, at or for a price of $200.00 or more, shall bear the rate of sales tax of the State where the same is to be taken and is

taken and used; which said tax shall be collected by the retailer at the time of said sale or sales. The wilful purchase or sale of an article for use outside of the State for the benefit of getting a lower rate of tax than herein designated shall be unlawful and punishable as herein provided.

Section 20-A. The sales tax on automobiles shall be paid to the Commisioner of Revenues instead of being collected by the Dealer and the Commissioner of Revenues shall be required by this law in issuing auto license for new cars to require a payment of two per cent (2%) as sales tax before issuing said license.

Section 20-B. The Commissioner of Revenues is hereby authorized and empowered to install a system of tax collection under this Act, based on the token system; and he is further authorized and empowered to secure suitable tokens, and to promulgate such rules and regulations as are necessary to a proper enforcement hereof.

Section 21. Penalty for Violation. The violation of any provision of this Act shall be a misdemeanor and punishable by a fine not exceeding one thousand ($1,000.00) Dollars, or by imprisonment not exceeding one year in the county jail, or both at the discretion of the court. Each day of violation shall constitute a separate offense.

Section 22. Provisions of Act Severable. The provisions of the Act are severable, and if any part or provision hereof shall be held void, the decision of the court shall not affect or impair any of the remaining parts or provisions of the Act.

Section 23. Repealing Clause. All Acts and parts of Acts in conflict herewith are hereby repealed; and this Act shall repeal Act 233 of 1935 known as the "Emergency Sales Tax Act."

Section 24. This Act will expire by limitation July 1st, 1939.

Section 25. Emergency Clause. Whereas, the people of the State of Arkansas, by their votes, have adopted the policy of furnishing free textbooks to public school pupils

in the first eight grades, calling upon the Legislature to provide funds therefor; and Whereas, it is necessary to provide funds therefor and make certain their availability at an early date so that a set-up may be established, texts selected and purchased, if the declared will of the people is carried out and textbooks furnished to said pupils by the summer and fall sessions of the public schools; and whereas, delay and uncertainty would nullify the declared will of the people; an emergency therefore exists for this Act to become effective at an early date.

And, Whereas, the people by their votes have adopted the policy of exempting homesteads from certain taxes, if and when the Legislature shall provide funds to substitute the loss of various revenue funds affected; and whereas, it is the will of the people that homesteads be exempted from such taxes, therefore, in order that said exemptions may be effected, it is necessary to provide funds to substitute the same and make the same certain and effective at an early date, which presents an emergency for this Act to go into effect earlier than it would otherwise.

And, Whereas, the Legislature of 1935 passed an emergency sales tax for the aid of the common schools and the public welfare, which will expire by limitation on July 1, 1937; and whereas, if said Act should expire before this Act shall take effect, it would be hazardous and ruinous to the public schools and to the public welfare funds, and whereas, it is absolutely necessary for the Sales Tax Law to be continued without interruption if the Welfare Department of the State is to function and needy persons be cared for, and the State receive from the Federal Government funds to aid in taking care of the needy people of the State, all of which presents an emergency for this Act to go into effect prior to the expiration of the Sales Tax Act of 1935, and at an early date, so that said aid may continue and the State perform its necessary functions in the support of the common schools and the public welfare.

Therefore, an emergency exists and is declared, and this Act being necessary for the public peace, health and safety, shall be in force and full effect and operation from and after its passage.

Act No. 364 of 1939.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. That Section 24 of Act No. 154 of the Acts of the General Assembly of the State of Arkansas for 1937, approved February 26, 1937, be and the same is hereby repealed.

Section 2. That said Act now furnishes funds essential for education, relief and general welfare of the people of the State of Arkansas, it is imperative that said law remain in effect, an emergency is hereby declared and this Act being necessary for the public peace, health and safety, shall be in full force and effect from and after its passage.

Approved: March 16, 1939.

Z. M. McCarroll,
Commissioner of Revenues.

Supplemental Regulation.

Arkansas Retail Sales Tax Law. Act 154 of 1937, as Amended by Act 364 of 1939

Article 16

Sales in Interstate Commerce

The Department of Revenues reserves the right to pass upon and determine each question regarding interstate commerce. If a ruling is desired as to whether or not the gross receipts of any given transaction are exempt under the Arkansas Sales Tax Law the Department will make such ruling, provided all of the facts surrounding such transactions are submitted for consideration.

Sales of Property Originating in the State of Arkansas

A. Where tangible personal property is located within the State at the time of sale and pursuant to and as a part of the sale does not leave the State the sale is within the Arkansas Retail Sales Tax Law, irrespective of where

the parties to the contract to sell are located, or the place where the contract was made or accepted or the purchase price paid. It is immaterial that the purchaser may, subsequent to the sale, transport the property out of this State or use it in interstate commerce.

B. The tax does not extend to sales where the seller makes physical delivery of the goods sold to the consumer at a point outside this State, when such goods are not to be returned to a point within this State. The tax does not apply to sales where the vendor by carrier or by mail delivers the goods sold from a point in this State to a point outside this State on order of buyer.

> In order to establish an exemption of the proceeds of such sales the seller will be required to retain for his records, and available for inspection, waybills, bills of lading, orders and other data as evidence of such transactions. If the vendee is a carrier, delivery to vendee in this State will constitute a taxable sale in the State, irrespective of the nature of the bills of lading or other shipping data.

Sales of Property Originating in Other States

When tangible personal property is purchased for use or consumption in this State and (1) the seller engages in any business activity in this State, and (2) delivery is made in this State, such sale is subject to the sales tax. Such sale is taxable regardless of the fact that the purchaser's order may specify that the goods are to be manufactured or procured by the seller at a specified point outside this State and shipped directly to the purchaser from the point or origin. (See McGoldrick *v.* Berwind-White Coal Company, Sup. Ct. of U. S. decided January 29, 1940, and companion cases; Graybar Electric Co. *v.* Curry, Alabama Sup. Ct., May 25, 1939, Aff'd. Sup. Ct. of U. S. Nov. 6, 1939.)

If the conditions above are met it is immaterial (1) that the contract of sale is closed by acceptance outside the State, or (2) that the contract is made before the property is brought into the State, or (3) that the contract of sale

purports to require transfer of possession of such property outside the State of Arkansas.

Delivery is held to have taken place in this State (1) when physical possession of the tangible personal property is actually transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails directed to the buyer in this State or placed on board a carrier (FOB or otherwise) and directed to the buyer in this state.

Engaging in business in this state may include any of the following methods of transacting business: maintaining directly, indirectly, or through a subsidiary an office, distribution house, sales house, warehouse or other place of business or by having an agent, salesman or solicitor operating within the state under the authority of the seller or its subsidiary irrespective of whether such place of business, agent, salesman or solicitor is located in this state permanently or temporarily or whether such seller or subsidiary is qualified to do business in this State.

Sales by a jobber of materials ordered from an independent out-of-state manufacturer with delivery directly from the out-of-state manufacturer to the purchaser is a retail sale within the meaning of the Act. (Hollis & Company *v.* McCarroll.)

Sales consummated as above stated are taxable whether the same originate in another state or a foreign country.

Z. M. McCarroll,

Commissioner of Revenues for the State of Arkansas.

September 24, 1940.

ARKANSAS GROSS RECEIPTS TAX LAW

ACT NO. 386 OF 1941

ACT TO PROVIDE FOR RAISING REVENUES TO SUSTAIN THE COMMON SCHOOLS; TO PROVIDE FREE TEXT BOOKS FOR THE FIRST EIGHT GRADES THEREOF; TO SUBSTITUTE HOMESTEAD EXEMPTION TAXES AND TO PROVIDE FUNDS FOR STATE CHARITABLE INSTITUTIONS, FOR LIBRARY SERVICES AND FOR THE OBJECTS OF THE WELFARE COMMISSION BY PRESCRIBING AND LEVYING SPECIFIC TAXES UPON GROSS RECEIPTS DERIVED FROM SALES; TO PROVIDE FOR THE ASCERTAINMENT, ASSESSMENT AND COLLECTION THEREOF; TO REQUIRE ALL TAXPAYERS UNDER THIS ACT TO SECURE PERMITS FROM THE COMMISSIONER OF REVENUES; TO PROVIDE FOR HEARINGS FOR AGGRIEVED TAXPAYERS; TO MAKE PROVISION FOR THE CARRYING OUT OF THE PURPOSES OF THIS ACT; TO PRESCRIBE PENALTIES FOR VIOLATION THEREOF; AND TO PROVIDE FOR THE DISTRIBUTION AND DISPOSITION OF THE MONIES RAISED UNDER THE PROVISIONS OF THIS ACT; AND FOR OTHER PURPOSES.

Be It Enacted By the General Assembly of the State of Arkansas:

SECTION 1. This Act shall be known and cited as "The Arkansas Gross Receipts Acts of 1941".

Section 2. **Definitions.** The following words and phrases shall, except where the context clearly indicates a different meaning, have, when used in this Act, the following meanings:

(a) Person: The term "person" includes any individual, company, partnership, joint venture, joint agreement, association (mutual or otherwise), corporation, estate, trust, business trust, receiver, or trustee appointed by any State or Federal Court or otherwise, syndicate, this State, any county, city, municipality, school district, or any other political subdivision of the State or group or combination acting as a unit, in the plural or singular number.

(b) Commissioner: The term "Commissioner" means and refers to the Commissioner of Revenues of the State of Arkansas, or any of his duly authorized agents.

(c) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. The term "sale" is also declared to include the exchange, barter, lease or rental of tangible personal property where such exchange, barter, lease or rental results or may result in either the transfer of the title or the possession. The term "sale" shall include also the sale, giving away, ex-

changing or other disposition of admission, dues or fees to clubs, to places of amusement, recreational, or athletic events, or for the privilege of having access to or the use of amusement, recreational, athletic or entertainment facilities. The term "sale" shall not include the furnishing or rendering of service or services, except as herein otherwise provided.

(d) Gross Receipts — Gross Proceeds: The term "gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction therefrom on account of the cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever.

The term "gross proceeds" or "gross receipts" shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such businesses or by any other person.

(e) Taxpayer: The term "taxpayer" means any person liable to remit a tax hereunder or to make a report for the purpose of claiming any exemption from payment of taxes levied by this Act.

(f) Established Business: The term "established business" means any business operated or conducted by any person in a continuous manner for any length of time from an established place or in an established manner.

(g) Seller: The term "seller" shall mean and

include every person making a sale in an established business as herein defined.

(h) Tax Period—Taxable Period: The term "tax period" or "taxable period" means either the calendar period or the taxpayer's fiscal period where a taxpayer has obtained a permit from the Commissioner of Revenues or from any of his duly authorized agents to use a fiscal period in lieu of a calendar period.

(i) Consumer—User: The term "consumer" or "user" means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(j) These definitions of words provided in this Section are for the purposes if this Act only.

Section 3. **Two Per Cent Tax Levied.** There is hereby levied an excise tax of two (2%) per centum upon the gross proceeds or gross receipts derived from all sales to any person subsequent to the effective date of this Act, of the following:

(a) Tangible Personal Property.

(b) Natural or artificial gas, electricity, water, ice, steam, or any other utility or public service except transportation services.

(c) Service by telephone and telegraph companies to subscribers or users, including transmission of messages, whether local or long distance. This shall include all service and rental charges having any connection with transmission of any message.

(d) Printing of all kinds, types and characters, including the service of overprinting, and photography of all kinds.

(e) The sale of tickets or admissions to places of amusement, to athletic, entertainment, recreational events, or fees for the privilege of having access to or the use of amusement, entertainment, athletic or recreational facilities, including free or complimentary passes and tickets, admissions, dues or fees, such free or complimentary passes, tickets, dues or fees hereby being declared to have a value equivalent to the sale price of tickets, passes, admissions, fees or dues of like kind or character.

The tax levied by this Act in respect to the sale of new automobiles shall be paid by the user or consumer to the Commissioner of Revenues instead of being collected by the dealer and the Commissioner shall be required by this law in issuing automobile licenses for new cars to require payment of the two per cent tax levied hereby before issuing said license.

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale.

Section 4. **Exemption from Tax.** There is hereby specifically exempted from the tax imposed by this Act the following:

(a) Gross receipts or gross proceeds derived from the sale of intoxicating beverages taxed as now or may hereafter be provided for by law; provided, however, that this exemption shall not be construed to alter or affect in any manner the tax imposed by Act 310 of the Acts of 1939 which provides for a consumers sales tax upon liquor, beer and wine.

(b) Gross receipts or gross proceeds derived from the sales of cigarettes taxes as provided in the Cigarette Tax Acts.

(c) The gross receipts or gross proceeds derived from the sale of tangible personal property or services by churches, except where such organization may be engaged in business for profit.

(d) The gross receipts or gross proceeds derived from the sale of tangible personal property, or services by charitable organizations, except where such organizations may be engaged in business for profit.

(e) Gross receipts or gross proceeds derived from the sale of food in public, common, high school or college cafeterias and lunch rooms operated primarily for teachers and pupils, not operated primarily for the public and not operated for profit.

(f) Gross receipts or gross proceeds derived from the sale of newspapers.

(g) Gross receipts or gross proceeds derived from sales to the United States Government.

(h) Gross receipts or gross proceeds derived from the sale of gasoline or motor vehicle fuel on which the motor vehicle fuel or gasoline tax has been paid to the State of Arkansas.

(i) Gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles purchased, whether within or without the State, provided that such sales within the State are made to persons to whom sales tax permits have been issued as provided in Section 12 of this Act.

Goods, wares, merchandise, and property sold for use in manufacturing, compounding, processing, assembling or preparing for sale, can be classified as having been sold for the purposes of resale or the subject matter or resale only in the event such goods, wares, merchandise, or property becomes a recognizable, integral part of the manufactured, compounded, processed, assembled or prepared products. Such sales of goods, wares, merchandise, and property not conforming to this requirement are classified for the purpose of this Act as being "for consumption or use".

(j) Gross proceeds derived from sales of advertising space in newspapers and periodicals and billboard advertising service.

(k) Gross receipts or gross proceeds derived from

gate admission fees at state, county or township fairs.

(l) Gross receipts or gross proceeds derived from sales for resale which the State is prohibited by the Constitution and Laws of the United States from taxing, or further taxing, or which the State is prohibited by the Constitution of the State from taxing or further taxing.

(m) Gross receipts or gross proceeds derived from isolated sales not made by an established business.

(n) Gross receipts or gross proceeds derived from the sale of any cotton or seed cotton or lint cotton or baled cotton, whether compressed or not, or cotton seed in its original condition; gross receipts or gross proceeds derived from the sale of raw products from the farm, orchard, or garden, where such sale is made by the producer of such raw products directly to the consumer and user; gross receipts or gross proceeds derived from the sale of livestock, poultry, poultry products, and dairy products of producers owning not more than five cows; exemptions granted by this subdivision shall not apply when such articles are sold, even though by the producer thereof, at or from an "established business"; neither shall this exemption apply unless said articles are produced or grown within the State of Arkansas. Provided, however, nothing in this subsection shall be construed to mean that the gross receipts or gross proceeds received by the producer from the sale of the products mentioned herein shall be taxable when

the producer sells at an "established business" located on his farm commodities produced on the same farm. The provisions of this subsection are intended to exempt the sale by livestock producers of livestock sold at special livestock sales. The provisions of this subsection shall not be construed to exempt sales of dairy products by any other businesses. The provisions of this subsection shall not be construed to exempt sales by florists, nursery men and chicken hatcheries.

The naming of specific products herein as being exempt from the taxing provision of this Act shall not be construed to exclude any other products coming within the meaning of general classes or products herein stated to be exempt.

(o) Gross receipts or gross proceeds derived from the sale of foodstuffs to governmental agencies for free distribution to any public, penal, and eleemosynary institutions or for free distribution to the poor and needy.

(p) Gross receipts or gross proceeds derived from the sale of any tangible personal property or services as herein specifically provided to any hospital or sanitorium operated for charitable and non-profit purposes; provided, however, that gross proceeds and gross receipts derived from the sale of materials used in the original construction or repair or further extension of such hospital or sanitorium shall not be exempt from this Act.

(q) Gross receipts or gross proceeds derived from the sale of secondhand and used tangible personal

property on which the tax levied hereby has once been paid, and where such property was traded in to and accepted by the seller as part of the purchase price of other tangible personal property.

(r) Unprocessed crude oil.

(s) Where there are adjoining cities or incorporated towns which are separated by a state line, the tax hereby levied upon gross receipts or gross proceeds derived from sales and services by taxpayers, in such adjoining cities or incorporated towns on the Arkansas side of the State line, shall be at the same rate as provided by law in such adjoining state, if any, not to exceed the rate provided in this Act.

Section 5. Preparation and Filing of Returns and Remitting the Tax. The tax levied hereunder shall be due and payable on the first day of each month, except as herein provided, by any person liable for the payment of any tax due under this Act; and, for the purpose of ascertaining the amount of the tax payable under this Act, it shall be the duty of all taxpayers on or before the 15th day of August, 1941, to deliver to the Commissioner, upon forms prescribed and furnished by him, returns under oath, showing the gross receipts or gross proceeds derived from all sales taxable or nontaxable under this Act during the preceding calendar month, and thereafter like returns shall be prepared and delivered to said Commissioner by all such taxpayers on or before the 15th day of each month for the preceding calendar month. Such returns shall show

such further information as the Commissioner may require to enable him to compute correctly and collect the tax herein levied.

In addition to the information required on returns, the Commissioner may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax levied herein. Such taxpayer shall compute and remit to the Commissioner the required tax due for the preceding calendar month, the remittance or remittances of the tax to accompany the returns herein required. Such return and remittances by the taxpayer as above required shall not be construed to constitute an assessment of the tax. If not paid on or before the 15th of such month, the tax shall be delinquent from such date. However, when the total amount of tax for which such taxpayer is liable for any month does not exceed Five ($5.00) Dollars, a quarterly report and remittance in lieu of a monthly report may be made on or before the 15th day of July, October, January and April of each year for the preceding three months' period.

Section 6. **Duty to Keep Adequate Records.** It shall be the duty of every taxpayer required to make a return and pay any tax under this Act to keep and preserve suitable records of the gross receipts or gross proceeds of sales taxable and nontaxable under this Act, including such books of account and such analyses of sales as may be necessary to determine the amount of the tax due hereunder and all invoices, credit memoranda, refund slips, and other records of goods, wares, merchandise, and oth-

er subjects of taxation under this Act as will substantiate and prove the accuracy of such returns. All such records shall remain in Arkansas and be preserved for a period of Three (3) years, and shall be open to examination at any time by the Commissioner. In the event that such records are kept outside of the State of Arkansas in the usual course of business they shall be produced within the State of Arkansas upon proper demand by the Commissioner within a period of fifteen (15) days after receipt of such demand. In the event the taxpayer fails to maintain or preserve proper records as described in this Section the Commissioner shall be empowered to arbitrarily assess, upon such information as is available to him, the amount of tax due by the taxpayer. The burden of proof of refuting such assessment as set up by the Commissioner shall be upon the taxpayer.

It shall also be the duty of every person who makes sales for resales to keep records of such sales which shall be subject to examination by the Commissioner of Revenues or by any of his duly authorized agents while engaged in checking or auditing the records of any person making such sales for resale. All such records of sales for resale shall remain in Arkansas and be preserved for a period of three (3) years, and shall be open to examination at any time by the Commissioner or by any of his duly authorized agents. In the absence of keeping such records the burden of proving that the sale was a sale for resale rather than a sale for consumption shall be upon such person.

Section 7. Taxpayer and Method of Collecting

the Tax. The tax levied by this Act shall be paid to the Commissioner by the seller of tangible personal property and by the seller or collector of admissions to places of amusement, recreational, or athletic events and by the seller of privileges of access to, or the use of amusement, entertainment, athletic, or recreational facilities, and by any other person furnishing any service subject to the provisions hereof.

Such taxes, penalty and interest shall at all times constitute a prior, superior and paramount claim as against the claims of unsecured creditors.

The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser.

In order to make such collections convenient the Commissioner of Revenues may in his discretion issue tokens in the denominations of one-tenth (1/10) of one cent and five-tenths (5/10) of one cent, in such quantity as the Commissioner deems necessary. Tax tokens shall not be accepted by the State in payment of taxes due. Tax tokens shall be redeemed at face value by the Commissioner, at Little Rock, Arkansas, and at such other points as he may designate.

The Commissioner may, in the alternative, in his discretion set up by regulation a bracket system of collecting the tax due hereunder.

Section 8. Alternative Basis for Tax Return. The tax imposed by this Act shall be in addition to any or all taxes except as otherwise provided herein. Any person taxable under this Act doing

business wholly or partly on a credit basis may make application to the Commissioner of Revenues for permission to prepare his returns on the basis of cash actually received. Such application shall be granted by the Commissioner under such rules and regulations as he may prescribe. Any person making such application shall be taxable on all monies collected during the taxable period.

Section 9. **Determination of Tax; Excess Payment; Deficiency Assessments; Notices.**

(a) **Examination of return; determination of tax; deficiency assessments.** As soon as practicable after each return is filed the Commissioner shall examine it. If it then appears that the correct amount of tax is greater or less than that shown in the return, the tax shall be recomputed and the correct tax determined. If the amount paid exceeds that which should have been paid on the basis of the tax so recomputed, the excess so paid with interest at 3 per cent per annum may be credited against a subsequent tax or such excess shall be refunded if requested by the taxpayer.

If the amount paid is less than the amount which should have been paid, the deficiency, together with interest thereon at the rate of one-half of 1 per cent per month from the time such tax was due, shall become due and payable after notice and hearing as hereinafter provided.

If any part of the deficiency is due to negligent or intentional disregard of this Act or of the authorized rules and regulations of the Commissioner,

but without intent to defraud, there shall be added as a penalty 10 per cent of the total amount of such deficiency, in addition to the interest above provided, which interest and penalty shall become due and payable after notice and hearing as hereinafter provided.

If any part of the deficiency is due to a fraudulent intent to evade the tax, then there shall be added as a penalty 50 per cent of such deficiency and, in such a case, the whole amount of tax unpaid, together with the penalty, shall become due and payable after notice and hearing as hereinafter provided, and an additional one per cent per month on the tax shall be added from the date such tax was due until paid.

No deficiency, interest or penalty shall be assessed for any month after the expiration of three (3) years from the date set for the filing of such monthly return.

(b) **Failure to make Return.** If any person fails to file a return, the Commissioner of Revenues or his duly authorized agents shall proceed to assess the tax against such person and shall notify him of the amount thereof. Such tax shall become due and payable together with 25 per cent of the tax as penalty after notice and hearing as hereinafter provided. In case of failure or refusal to file a remittance, or the filing of an uncollectible remittance, with any return required by this Act, within the time prescribed by this Act, 10 per cent of the tax shall be added as penalty; provided, that when

a return or collectible remittance is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to wilful neglect, no such addition shall be made to the tax. The amount so added shall be collected as part of the tax.

Section 10. **Right of Taxpayer to a Hearing.** If the Commissioner, after examining the return of any taxpayer or upon the failure of any taxpayer to file a return, determines that the taxpayer is liable to the State for any taxes specified under this Act, he shall give such taxpayer notice of his intention to collect such assessment by issuing a certificate of indebtedness as hereinafter provided, or by any other legal means. Such taxpayer may, if he so desires and duly notifies the Commissioner in writing within twenty (20) days after receipt of such notice of intention, demand a hearing on the question of the issuance of such certificate of indebtedness. Thereupon the Commissioner shall set a time and place for hearing and shall give the taxpayer reasonable notice thereof. The taxpayer shall be entitled to appear before the Commissioner and be represented by counsel and present testimony and argument. After the hearing the Commissioner shall render his decision in writing and by order establish any deficiency or tax found by him to be due and payable. If any taxpayer is aggrieved by any decision of the Commissioner he shall be required to pay the amount of taxes, interest and/or penalties found due by the Commissioner and after the payment of such taxes, interest and/or penalties, he shall be permitted to appeal within a period of thirty

ty (30) days after such decision to the Chancery Court of Pulaski County, Arkansas, where the matter shall be tried de novo. An appeal shall also lie from the Pulaski Chancery Court to the Supreme Court of Arkansas as in other cases now provided by law.

In the event any taxpayer is found by such court or courts entitled to recover any sums paid pursuant to the orders of the Commissioner as hereinbefore provided, such sums shall be refunded to him from a fund to be created by the Commissioner out of monies collected under this Act, to be known as the "Special Gross Receipts Refund Account", to be maintained for such purposes, which account shall not exceed the sum of $10,000.00

No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this Act.

Section 11. **Authority to File Certificates of Indebtedness.** If the taxpayer fails to demand a hearing within the time allowed, after an assessment of the tax due the State and proper notice thereof as hereinbefore provided, or if the taxpayer shall fail to pay the tax assessed by the Commissioner after such a hearing and an order by the Commissioner establishing such tax, as hereinbefore provided, then the Commissioner may, as soon as practicable thereafter, issue to the Circuit Clerk of any county of the State, a certificate certifying that the person therein named is indebted to the State for the tax established by the Commissioner to be due. The Circuit Clerk shall immediately enter upon

the Circuit Court judgment docket the name of the delinquent taxpayer, the amount certified as being due, a short name of the tax, and the date of the entry upon the judgment docket. Such entry shall have the same force and effect as an entry on such judgment docket of a judgment rendered by the Circuit Court of such county, and shall constitute and be evidence of the state's lien upon the title to any interest in any real property of the taxpayer named in such certificate. The entry of such certificate as a judgment shall constitute, in addition to the force and effect above described, a lien also upon all personal property of the taxpayer named therein from the time of the entry of such certificates.

Such lien shall be in addition to any and all other liens existing in favor of the State to secure the payment of such unpaid tax, penalty, interest and costs, and such lien shall be paramount and superior to all other liens of whatsoever kind and character attaching to any of said property subsequent to the date of such entry upon such judgment docket.

On the entry of such certificate, the Circuit Clerk shall issue an execution directed to the Sheriff of the county, commanding him to levy upon and against all such real and personal property of the taxpayer, which execution shall be by the Clerk placed in the hands of the Sheriff for levying thereon, and the Commissioner shall thereby have all the remedies and may take all the proceedings for the collection of such tax which may be had or taken upon the recovery of a judgment at law. Such execution shall

be issued and be served or executed in the same manner as now provided for the issuance and service of executions upon judgments rendered by the Circuit Courts of this State.

The Circuit Clerks and the Sheriffs shall be entitled to receive the same fees now provided for by law in such matters. Such fees shall be collected from the taxpayer by the Sheriff, in addition to the tax, penalties and interest included in such certificate of indebtedness; provided, however, that in the event such Sheriff is unable, after diligent effort, to effect collection of such tax, interest, penalties and costs, the Commissioner shall be empowered and authorized to pay such fees as are properly shown to be due, to such Clerk and Sheriff out of the "Special Gross Receipts Refund Account" provided for in Section 10 of this Act.

In addition to the method of collections herein provided, the Commissioner of Revenues, with the approval of the Governor, shall be authorized and empowered to employ an attorney or attorneys for the purpose of collecting taxes delinquent under this Act or under any other Sales Tax Act.

Nothing in this Act shall preclude the Commissioner from resorting to any other legal means of collecting such taxes as may now be provided by law, and the issuance of a certificate of indebtedness, the entry thereof by such Clerk and the levy of execution, as provided herein, shall not constitute an election of remedies in respect to the collection of such tax.

Section 12. **Permits.** It shall be unlawful for any taxpayer to engage or transact business within this state unless a written permit or permits shall have been issued to him. Every such taxpayer desiring to engage in or conduct a business within this state shall file with the Commissioner of Revenues an application for a permit to conduct such business, setting forth such information as the Commissioner may require. The application shall be signed by the owner of the business as a natural person, or, in the case of a corporation, by a legally constituted officer thereof. Any taxpayer who engages in business, subject to the provisions of this Section without a permit or permits, or after a permit has been suspended, shall be subject to penalties as hereinafter provided.

A separate permit for each place of business to be operated, must be obtained but no charge therefor shall be made by the Commissioner. Upon filing of each application in proper form, the Commissioner shall grant and issue to each applicant a separate permit for each place of business within the State. A permit is not assignable and shall be held valid only for the person in whose name it is issued and for the transaction of business at the place designated therein. The permit shall at all times be conspicuously displayed at the place of business for which issued in a position where it can be easily seen. Said permit shall be in addition to all other permits now or hereafter required by the Statutes of the State of Arkansas.

Any taxpayer operating under a permit as pro-

vided in this Act shall, upon discontinuance of business by sale or otherwise, return such permit to the Commissioner for cancellation together with a remittance for any unpaid or accrued taxes. Failure to surrender a permit and pay any and all accrued taxes will be sufficient cause for the Commissioner to refuse a permit subsequently to such taxpayer to engage in or transact any other business in this state. In the case of a sale of any business, the tax shall be deemed to be due at the time of the sale of the fixtures and equipment incident to such business and shall constitute a lien against the stock and such fixtures and equipment in the hands of the purchaser thereof or any other third party until such tax is paid. The Commissioner shall not issue a permit to continue or conduct said business to the purchaser thereof until all tax claims due the State of Arkansas hereunder have been settled and paid.

All permits issued under the provisions of this Act shall expire at the time of cessation of business at the place or location of the business within the state. Whenever a holder of a permit fails to comply with any provision of this Act, the Commissioner shall give notice to the taxpayer of an intention to revoke such permit. The taxpayer may, within ten (10) days after receipt of such notice of intention, apply to the Commissioner for a hearing in the same manner as provided for in Section 10 of this Act. Such hearing shall be conducted at a time and place to be designated by the Commissioner and the taxpayer shall be entitled to introduce testimony and be represented by counsel, and the Commissioner shall determine at such hearing whether such

taxpayer's permit should be revoked. The taxpayer shall be entitled, within thirty (30) days from the date of the order of the Commissioner revoking such permit, to appeal to the Chancery Court in his county where the action shall be tried de novo, and an appeal shall lie from such Chancery Court to the Supreme Court of Arkansas as in other cases provided by law.

In event the taxpayer fails to apply for a hearing within ten (10) da,s after receipt of such notice of intention, the Commissioner may revoke such permit. Any said permit may be renewed upon the filing of proper returns and the payment of all taxes due under this Act and/or removal of any other cause or causes of revocation or suspension.

Section 13. **Cash Deposit or Bond Required.** All persons doing a retail business in this State, which business is subject to the provisions of this Act, who do not have a permanent business domicile in this state, shall make a sufficient cash deposit or sufficient bond with the Commissioner to cover their annual sales tax, before doing business in this state or before receiving a permit to do business in this State as provided in Section 12 of this Act.

Section 14. **Discount Allowed Taxpayer for Prompt Payment.** At the time of transmitting the returns required under this Act, to the Commissioner, the taxpayer shall remit therewith to the Commissioner except as hereinafter provided, ninety-eight (98%) per centum of the tax due under the applicable provisions of this Act, and failure to remit such tax at the time of filing the return sh

cause said tax to become delinquent; provided, however, in the event the payment of any tax due under the applicable provisions of this Act becomes delinquent for a period of five days the taxpayer forfeits his claim to the two (2%) per centum discount and must remit to the Commissioner one hundred (100%) per centum of the amount of the tax due plus any penalty and interest due. This discount is allowed the seller or taxpayer to remunerate him for keeping Sales Tax records, filing reports, collecting the tax, and remitting it when due as required by this Act.

Section 15: Administration of Act.

(a) The administration of this Act is vested in and shall be exercised by the Commissioner. The Commissioner shall promulgate rules and regulations, and prescribe forms for the proper enforcement of this Act.

(b) Such rules, regulations and forms shall be dated and issued under a systematic method of numbering, and copies made available to any person requesting same. A complete file of all such rules, regulations and forms shall be kept in the office of the Commissioner.

Section 16. **Cost of Administration of Act.** The administration cost of this Act shall not exceed three (3%) per centum of the actual revenues collected. If any funds appropriated for the administration of this Act shall remain in the hands of the Commissioner at the end of each fiscal year

that shall not have been actually used in the administration of this Act, then such funds shall be remitted by the Commissioner of Revenues to the State Treasurer for distribution in the same manner and for the same purposes provided for in Section 18 of this Act.

Section 17. **Purpose of Act.** The purposes of this Act are to provide relief of the Common Schools, to provide funds to buy free text books for the first eight grades thereof, to provide funds for the state charitable institutions, to provide funds for circulating library service in connection with the public schools and funds to take the place of homestead exemptions, and to provide for the wards of the State who will receive support through the State Welfare Commission, and for worthy causes.

Section 18. **Distribution of Funds Collected.** Of the monies received by the Commissioner on account of taxes collected under this Act, he shall pay into the State Treasury to a fund known as the Textbook Fund 7% during the fiscal year 1941-42 until $360,000 shall have been paid in for said fiscal year, and thereafter 7% each fiscal year until $360,000 shall have been paid in each year with which to furnish free textbooks for the first eight grades in the common schools, and library facilities for county libraries. He shall, beginning with the fiscal year beginning July 1, 1941, pay into a fund known as Homestead Tax Exemption Fund 4% of the monies collected during each fiscal year, until $300,000 is paid in said fund each fiscal year hereafter, to be used to replace monies heretofore accruing to the different funds from homestead taxes, and to be

distributed according to the statute on that subject. He shall pay into a fund known as the Charitable Institutions Fund 10% during each fiscal year, which fund is to be used for the purpose of maintaining the State Charitable Institutions. He shall pay into the State Treasury to the credit of the Welfare fund 25% of the taxes collected under this Act and to the common school fund, 50% thereof. He shall pay to the State Treasury to be credited to the Teacher's Salary Fund, 1½% of the taxes collected under the Act. He shall distribute 1½% thereof to the University of Arkansas Fund, The Arkansas State Teachers College Fund, the four (4) Agricultural College Funds, and the Henderson Teachers College Fund on the prorata basis according to the millage levied for the support of respective funds. And he shall distribute 1% thereof to the Confederate Pension Fund. Any excess from the percentage allocated to the Textbook Fund and the Homestead Exemption Fund over the maximum set up in this section for the benefit of said funds shall be credited to the School Equalizing Fund. Said monies are to be used for the purposes for which collected and distributed. Provided that there may be appropriated from the textbook fund necessary funds to maintain a library service as provided by law. The monies paid into the Common School Fund shall be used only for the payment of warrants issued for the maintenance of schools and said library service, to be paid in order of registration as now provided by law. Remittance of taxes imposed under this Act shall be made to the Commissioner by certified checks, cashiers' checks, money order~~, or money.~~ This Section shall not be con-

strued as repealing Section 15 of Act 162 of the Acts of 1937.

Section 19. **Criminal Penalties.** Any taxpayer who continues to do business after the effective date of this Act without first obtaining permit provided for in Section 12 of this Act, or any taxpayer who shall continue to do business after the revocation or suspension of any such permit obtained pursuant to this Act, shall be guilty of a misdemeanor punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month, nor more than six months, or both such fine and imprisonment; each day of doing business in violation of this Act shall constitute a separate offense, punishable accordingly.

Section 20. **Severance Clause.** If any section, subsection, sentence, clause or phrase of this Act is held to be invalid, the decision shall not affect the validity or the meaning of the remaining portions of this Act. The Legislature hereby declares that it would have passed this Act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Section 21. **Effective Date.** The provisions of this Act shall be effective as of July 1st, 1941.

Section 22. **Repeal of Conflicting Laws.** From and after July 1st, 1941, Act 154 of the Acts of the General Assembly of 1937 and Act 364 of the Acts

f the General Assembly of 1939 are hereby re-
pealed; provided, however, any taxes which may
ave accrued under any Statute repealed hereby, but
which have not yet been collected, by the Commis-
ioner, shall be, when collected, apportioned in the
ame manner as taxes accruing and collected pur-
uant to the terms and provisions of this Act; and
rovided further, that the provisions of this Act
elative to the collecting of taxes due hereunder
hall be applicable to the collection of taxes which
nay have accrued prior to the effective date of this
ct under the terms of any Act hereby repealed but
ot collected until after the effective date of this
ct; and provided further that in the event of a
dicial determination that this act is unconstitution-
l and void in its entirety, then and in such event,
ct 154 of the Acts of the General Assembly of
937 and Act 364 of the Acts of the General Assem-
ly of 1939 shall be and continue in full force and
ffect.

PPROVED: 3-26-'41.

Article 27 of Regulations Promulgated under Act 386 of the Acts of the General Assembly for the year 1941:

"STATE SALES and INTERSTATE SALES. When tangible personal property is purchased by any person or business in this State for any purpose other than for resale and (1) the seller is a corporation qualified to do business in this State, or the seller carries on any business activity in this State, and (2) delivery is made in this State, such sale is intra-state and subject to the Gross Receipts Tax.

The term "business activity" for the purpose of this regulation means maintaining any office of any kind, warehouse or place of distribution, directly or indirectly by means of a subsidiary and/or agency, or the maintaining of any other place, whether business location or otherwise, from which orders are solicited or taken or at which place employees, agents and/or solicitors have their headquarters, or the mere solicitation of any business in this State or the servicing of any property by any employee, agent, or salesman, irrespective of whether a place of business is maintained, or if maintained, whether the place of business is permanent or temporary and irrespective of the length of time of engaging in such business activity as herein defined.

For the purpose of this regulation "delivery" is made in this State (1) when actual possession of the tangible personal property is transferred to the buyer within this State, or (2) when the tangible personal property is placed in the mails or on board a carrier (FOB or otherwise) and directed to the buyer in this State. In instances of sales under the conditions just recited it is immaterial that the goods were produced by the seller outside the State and shipped directly to the purchaser from the point of origin or that the contract of sale was closed by acceptance outside the State or that the contract was made before the property was brought into the State or that the buyer may subsequently transport the property out of the State for use or consumption.

When tangible personal property is sold by sellers in this State and the seller is obligated to deliver the property

to a point outside the State or to deliver it to a carrier or to the mail to be delivered to a point ouside the State, the tax does not apply, such sales being sales in interstate commerce.''

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

MURRAY B. MCLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS .... *Petitioner*

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY .... *Respondents*

BRIEF OF PETITIONER

LEFFEL GENTRY
Counsel for Petitioner
Boyle Building
Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

INDEX

Cases Cited.

Statutes Cited.

STATEMENT OF THE CASE

The Commissioner of Revenues of the State of Arkansas brought separate suits against J. E. Dilworth Company and Reichman-Crosby Company of Memphis, Tennessee, to require them to collect and pay to the Commissioner of Revenues the sale tax levied by Act 154 of the Acts of the General Assembly of Arkansas for the year 1937, as amended, and similarly to collect and pay the sales or gross receipts tax levied by Act 386 of the Acts of the General Assembly of Arkansas for the year 1941 (which latter act repealed Act 154 of 1937 as amended (R. 1-4, 12-15). The cases were consolidated for trial (R. 20-21).

According to the facts admitted by way of answer or by stipulation: Each of the defendants (in the separate cases) are foreign corporations, not qualified to do business in Arkansas and having no place of business here. Orders for merchandise are taken by traveling salesmen from customers in Arkansas, subject to acceptance by the Company at Memphis, and orders are received by mail and telephone at Memphis from customers in Arkansas. When these oredrs are accepted the merchandise is shipped by common carrier direct to the purchaser in Arkansas, f.ob. Memphis, purchaser paying the freight (R. 7-9; 9-11; 15-18).

The tax sought to be collected is two per cent (2%) of the proceeds derived by the defendants from sales to purchasers in Arkansas where delivery was finally made to the purchasers in Arkansas (R. 1-4, 12-15).

The regulations of the Commissioner of Revenues providing for the collection of the tax under each of the

pertinent acts are set forth at length in the appendix to the brief in support of petition for certiorari.

The defense of each of the parties was as follows:

(1) The regulation of the Commissioner of Revenues of Arkansas providing for the collection of the tax was beyond the scope and intent of either of the acts under which the taxes were sought to be collected, and therefore the regulation was invalid and the Commissioner of Revenues was without authority under either of said acts to collect the taxes on transactions of the sort involved.

(2) The collection of the tax was a violation of the Constitution of the State of Arkansas.

(3) The collection of the tax was a violation of the Commerce Clause and the Due Process Clause of the Constitution of the United States (R. 7-9; 15-18).

Upon trial of these causes in the lower court, a decree was rendered dismissing the complaints of the Commissioner of Revenues in each of the cases (R. 11-12; 19).

Upon appeal of the causes to the Supreme Court of Arkansas, the decision of the lower court was affirmed and petition for rehearing denied (R. 22; 31). The decision was predicated upon the conclusion of the court, stated in its opinion, that a sales tax could not be levied upon transactions of the sort here involved because it would be a burden on interstate commerce and therefore in violation of the Commerce Clause of the Constitution of the United States (R. 22-28).

The petitioner petitioned this Honorable Court for a writ of certiorari to be issued to the Supreme Court of Ark-

ansas which was granted and the cause is now before the court for review of the decision of the Supreme Court of Arkansas.

SUMMARY OF ARGUMENT

Point 1

The tax is not an occupation or license tax against the seller, but the tax is levied against the purchaser.

Point 2

Receipt of the goods within the taxing state by the purchaser is subject to the state taxing power, apart from its effect on interstate commerce.

Point 3

The tax is not discriminatory and does not burden interstate commerce.

Point 4

Jurisdiction of the seller is not a question in issue.

ARGUMENT

Point 1

The Tax Is Not an Occupation or License Tax Against the Seller, But the Tax Is Levied Against the Purchaser

The tax provided by Act 233 of 1935 and Act 154 of 1937 as amended is commonly referred to as a "sales tax" and sometimes denominated a "retailers sales tax". Since the enactment of Act 386 of 1941 the tax is still referred to as a "sales tax", though called a "gross receipts tax". However, whatever name may be given to the tax levied by any of the said Acts the type of the tax provided by each of the said Acts is essentially the same. The only changes that have been made in the tax since 1935 have been with regard to the scope of the tax and the mechanics of the administration of the law and the collection of the tax.

There are various kinds of so called sales taxes and it is therefore necessary that we examine the taxing Acts involved in these cases and determine what kind of a sales tax is there provided. It should be noted at the outset that the underlying principle common to all sales taxes of whatever form, is the taxation of the gross amounts involved in the sales transactions. In some instances the tax may take even the form of a gross income tax based on income from all sources. In others it takes the form of a gross receipts tax based on sales generally of tangible personal property and oftentimes includes a tax on the proceeds derived from the sale of certain services. At other times the tax takes the form of a tax on gross receipts from only retail sales and/or the retail sales of certain services.

Still at other times the tax takes the form of a tax on gross proceeds derived from the sales of selected transactions or services. Finally, the tax may take the form of a tax on the use of property measured by the price the user paid for the property. This form of tax is often used to supplement a sales tax.

Broadly speaking, it would seem that sales taxes may be classified in two ways dependent upon who pays the tax. Where the tax is measured by the gross proceeds derived from a sale and is to be paid by the purchaser who buys the article for use and consumption and not for resale, the tax is usually denominated a consumers sales tax. Where a tax, though measured by sales, is upon the seller the tax is an occupation or license tax. An essential element of a consumers sales tax is that the tax is required to be paid by the consumer, even though the seller may be required to collect and remit the tax. Sales taxes in the form of occupational and license taxes are laid upon the privilege of engaging in business and the tax is therefore upon the seller or vendor, notwithstanding that such tax may be passed on by the seller or vendor by adding to the price of the merchandise sold to the consumer.

The Acts of the General Assembly of Arkansas under consideration levied a consumers sales tax. The tax is laid upon the purchaser for consumption as distinguished from a sales tax levied as an occupation or license tax upon the seller.

In the case of *Wiseman* v. *Phillips*, 191 Ark. 63, " Court had under consideration Act 233 of 1935 which in its principal provisions is no different from Act 154 of 1937 or Act 386 of 1941.

To the same effect is the decision of the Supreme Court of Arkansas in the case of *Arkansas Power & Light Company* v. *Roth,* 193 Ark. 1015.

Therefore, the case of *Crenshaw* v. *Arkansas,* 227 U. S. 389, 57 L. Ed. 565, 33 S. Ct. 294, cited by the Supreme Court of Arkansas as authority for its holding that collection of the tax on the transactions involved would burden interstate commerce is not an applicable authority because the tax there involved was a license tax on peddlers. The substance of the opinion in that case was that a tax could not be levied on an interstate occupation or the privilege of engaging in interstate commerce.

Point 2

Receipt of the Goods Within the Taxing State by the Purchaser is Subject to the State Taxing Power, Apart From Its Effect on Interstate Commerce

As far as concerns the question of whether the collection of the tax violates the commerce clause of the Constitution of the United States, since the tax is laid upon the purchaser, it makes no difference where the contract of sale is made or where the title or ownership of the goods is transferred since delivery of the goods was made to the purchaser within the State of Arkansas. Nor does it make any difference as to the manner in which the delivery of the goods was accomplished, or whether the constructive possession of the goods was obtained by the purchaser upon delivery to a common carrier outside the state.

In the case of *McGoldrick* v. *Berwind-White Coal Mining Company,* 309 U. S. 33, 57; 84 L. Ed. 565; 60 S. Ct. 388, apart from the conclusion of the court that the tax there

involved did not burden interstate commerce, the court further held that the tax was conditioned upon a local activity, *delivery of goods within the state upon their purchase for consumption,* which activity, apart from its effect on interstate commerce, was subject to the state taxing power.

Practically this same reasoning was assigned by the court for its decision sustaining the validity of the taxes involved in the earlier cases of *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217; *Wisconsin & Michigan Ry.* v. *Powers,* 191 U. S. 379. In each of these cases it was in effect held that the thing taxed was a valid subject of the state's taxing power and that therefore there was no violation of the interstate commerce clause of the Constitution notwithstanding that the tax was measured by gross receipts from interstate commerce.

Also in the case of *Western Live Stock* v. *Bureau of Revenues,* 303 U. S. 250, this Court sustained a state occupation tax measured by the gross receipts of a publisher derived from the advertising in a magazine with interstate circulation. The Court ruled that the tax was properly imposed on the local occupation of preparing, printing and publishing magazine advertising within the taxing state, and that the gross receipts from the advertising fairly measured the value of the local enterprise.

So it appears from the decisions cited *supra* that this Court has even sustained privilege or occupation taxes where the thing taxed was a valid subject of the state taxing power and was not merely the taxing of the occupation or privilege of engaging in interstate commerce. The rationale of each of these decisions was that the thing taxed

was a local activity, and not the privilege of engaging in interstate commerce.

Likewise, the decisions of this Court sustaining a fixed sum license tax imposed on an agent of an interstate seller for the privilege of selling goods within the taxing state have been largely predicated upon the conclusion that the thing taxed was not the privilege of carrying on interstate business, but that the local activity was subject to the state's taxing power, aside from any question of its effect indirectly on interstate commerce. *Howe Mach. Company* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430; *Kehrer* v. *Stewart*, 197 U. S. 60, 49 L. Ed. 663; *Baccus* v. *Louisiana*, 232 U. S. 334, 58 L. Ed. 627; *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157.

In decisions other than the one in the case of *McGoldrick* v. *Berwind White Coal Mining Company*, cited *supra*, this Court has sustained taxes on sales, or has sustained use taxes, measured by gross receipts where the transactions involved interstate commerce, and while in all or some of these cases (particularly those involving use taxes), the primary reason assigned for upholding the validity of the tax was that the thing taxed was the sale or use after the interstate commerce journey had ended, the fundamental theory supporting these decisions was that the thing taxed was a local activity which properly was within the scope of the state's taxing authority. *Gregg Dyeing Company* v. *Query*, 286 U. S. 472; *Henneford, et al.*, v. *Silas Mason, et al.*, 300 U. S. 577; *Graybar Electric Company* v. *Curry*, 308 U. S. 513.

Therefore, it is apparent from a close analysis of all of the decisions cited under this point of the argument

that insofar as concerns the validity of a tax under the interstate commerce clause, it makes no difference whether the tax is in form of a sales or use tax or an occupation or privilege tax so long as the tax levied is predicated upon a local activity which is subject to the state's taxing power and is not levied directly against the occupation or privilege of engaging in interstate commerce.

It is important, however, to keep in mind that in determining whether the particular local activity is a valid subject to the state's taxing power the character or type of tax may be decisive; for example, where the type of tax is an occupation tax, even though it be not a fixed sum license tax but a tax measured by gross receipts derived by the seller; the question of the validity of the tax may properly turn upon whether the taxing state can grant or deny the privilege of engaging in the particular business, and if the business is exclusively interstate then the tax is not valid, notwithstanding there may be certain local activities incidental to the carrying on of the interstate business because a state may not tax the privilege of engaging in interstate business. In other words, it is recognized that where a thing taxed directly affects interstate commerce, local activity alone may not be sufficient to sustain validity of the tax and in such cases the question ultimately to be decided is whether the tax *burdens* interstate commerce. Which proposition is the subject of the following point of this argument.

But where a use tax is involved, or a consumers sales tax, as is here involved the tax is not an occupation tax, but is a tax upon the user or purchaser and no contention could therefore be made that the tax, as levied against such user or purchaser, directly affects interstate commerce.

Of course, there remains the question of the effect on interstate commerce of requiring the interstate seller to collect such sales tax from the purchaser, or use tax from the user. This question will also be discussed under the following point of the argument.

Point 3

The Tax Is Not Discriminatory and Does Not Burden Interstate Commerce

As has heretofore been pointed out the tax under consideration is not an occupation tax or a tax upon the seller for the privilege of engaging in business and the decisions of this Court, such as the case of *Crenshaw* v. *Arkansas*, cited *supra*, holding that a tax may not be levied upon the privilege of engaging in interstate commerce, are not applicable.

Moreover since the tax is to be paid by the purchaser, and the seller is only the collecting agent it would seem clear that the tax is not levied directly on the gross proceeds derived from interstate commerce, but is simply measured by the amount paid by the purchaser to the seller. This Court has never held that state taxes may not be measured by gross receipts from interstate commerce, provided the subject of the tax involved was not objectionable as was pointed out in Point 2 of this argument.

However, it is conceded that this court has, in some instances, condemned taxes from gross receipts from interstate commerce even where the subject of the taxes was within the scope of the State taxing power.

J. D. Adams Manufacturing Co. v. *Storen*, 304 U. S. 307; 82 L. Ed. 1365;

Gwin, White & Price v. *Henneford*, 305 U. S. 434; 83 L. Ed. 272.

But these decisions did not hold that all taxes which were levied on the gross receipts, or measured by the gross receipts, from interstate commerce were invalid, but the particular taxes involved in these cases were condemned because they discriminated against interstate commerce. In each of the cases the tax "was held invalid because there the court found the receipts derived from activities in interstate commerce, as distinguished from the receipts from activities in intrastate commerce, were included in the tax, the sale price, without segregation or apportionment".

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 57.

In this connection it should again be pointed out that this court has, in numerous cases, sustained taxes on valid subjects measured by gross receipts from interstate transportation or commerce.

Maine v. *Grand Trunk Ry. Co.*, 142 U. S. 217;

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1;

American Manufacturing Co. v. *St. Louis*, 250 U.S. 459;

Western Live Stock v. *Bureau of Revenues*, 303 U.S. 250;

Coverdale v. *Arkansas Louisiana Pipe Line*, 303 U.S. 604, 610;

McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 57.

From a study of the decisions cited *supra*, it is apparent that in considering the taxes involved in this case, the question of their validity under the interstate commerce clause of the Federal Constitution depends upon whether the taxes, as levied, discriminate against or burden interstate commerce. In this connection it should be pointed out (1) that the tax is not levied directly on interstate commerce, but is simply measured by the gross receipts of the sale; (2) that the tax is to be collected on all transactions where actual delivery of the goods is made to the purchaser within the taxing state; and (3) the tax is not levied against the seller, but against the purchaser.

It will doubtless be argued by counsel for respondents that the present taxes are invalid because there is a risk of a multitple tax being levied on the same interstate commerce transaction. There is no such threat.

It will be seen from an examination of the regulations of the Commissioner of Revenues relating to each of the Acts involved (Appendix - Petition for certiorari), that no tax is to be collected on sales originating in Arkansas where the goods are to be shipped outside the state; and no question is here presented as to the effect of taxes levied by the state of the seller on these same transactions. A similar proposition was passed up by this court in the case of *Southern Pacific* v. *Gallagher*, 306 U. S. 167, involving the validity of a use tax where the taxing statute allowed no credit for any foreign tax on the sale of the property, and this court said that there would "be time enough to resolve that argument 'when a taxpayer paying in the state of origin is compelled to pay again in the state of destination' ".

Southern Pacific v. *Gallagher*, 306 U.S. 167.

In this connection, see, also, the following cases in which the court has indicated that there is no cumulative burden threat even where there are taxes levied by different states measured by gross receipts from the same interstate commerce transactions, where the taxes levied by the separate states are not on the same activity or, that is, where the taxes levied by the different states are different taxes.

Coverdale v. *Arkansas-Louisiana Pipe Line*, 303 U.S. 604.

Department of Treasury v. *Wood Preserving Co.*, 313 U.S. 62.

See, also

State Taxation Interstate Commerce Clause (1940), 28 Cal. L. Rev. 168, 173, 174.

American Manufacturing Co. v. *St. Louis*, 250 U.S. 459.

Heisler v. *Thomas Colliery Co.*, 260 U.S. 245.

Gross Receipts Taxes on Interstate Transportation and Communication, 57 *Harvard Law Review* 40, 66-70, 74-75, 86-95.

Thus far the argument has been concerned with the validity of the tax (under the commerce clause) as levied against the purchaser to whom the goods were delivered within the State of Arkansas. There is the further question of whether requiring the interstate seller to collect the

tax burdens interstate commerce. This question was decided by this court in the case of

Felt & T. Mfg. Co. v. *Gallagher*, 306 U.S. 62

It was there held that notwithstanding the seller was doing business exclusively in interstate commerce, the commerce clause of the Federal Constitution did not prohibit a taxing state from requiring the interstate seller to collect the tax, provided the taxing state could obtain jurisdiction of such interstate seller. To the same effect is the decision in the case of

Nelson v. *Sears-Roebuck & Co.*, 312 U.S. 359.

Prior to these two decisions, it had been held by this court in the cases of *Gregg Dyeing Company* v. *Query* and *Heneford, et al.*, v. *Silas Mason, et al.*, cited *supra*, that a use tax measured by proceeds from interstate commerce sales was not invalid. The primary question in the *Felt & T. Mfg. Co.* case and the *Sears-Roebuck & Company* case related to whether the interstate seller could be required to collect the tax, and as regards this, it makes no difference whether the tax required to be collected by the interstate seller is a sales or use tax, or some other kind of tax; and in this connection the effect of the decisions mentioned is that the only limitation upon the right of the taxing state to require the seller to act as its collecting agent is that which may arise from "the impotency of the state's power or jurisdiction over the seller".

Point 4

The Jurisdiction of the Seller Is Not a Question in Issue

The respondents answered and defended the suits brought against them to enforce collection of the tax and, therefore, there is no question in issue as to "the impotency or lack of jurisdiction" of the state.

Respectfully,

Leffel Gentry
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Little Rock, Arkansas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Petitioner,

vs.

J. E. DILWORTH COMPANY AND REICHMAN-CROSBY COMPANY,

Respondents,

SEPARATE REPLY BRIEF ON BEHALF OF RESPONDENT, J. E. DILWORTH COMPANY.

ALLAN DAVIS,
Counsel for Respondent.

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To THE HONORABLE HARLAN F. STONE, *Chief Justice, and the Honorable Associate Justices, of the Supreme Court of the United States*:

Summary of Issues Involved.

Petitioner assigns two reasons for allowance of petition for Writ of Certiorari. First, the decision of the Supreme Court of Arkansas is upon an important question of Federal Law which has not been directly passed upon by this Court. Second, the decision of the Supreme Court of Arkansas is in conflict with principles established by prior

decisions of this Court. Bearing in mind that the Supreme Court of Arkansas concluded that a sales tax would be a burden on interstate commerce for the tax to be imposed and collected under the facts in this case, Respondent urges first; that the determination of the case by the Arkansas Supreme Court was not on a Federal question; second, if a Federal question was decided no conflict with the decision is established by prior decisions of this Court; and third, if a Federal question was decided it was not necessary to the determination of the cause.

ARGUMENT.

In order that we may reconcile holdings of the Arkansas Supreme Court with the decisions of this Court, it is important that the following facts be restated for the Court's convenient reference: (R-22-23).

(1) Respondent is a foreign corporation.

(2) Respondent is not authorized to do business in Arkansas.

(3) Respondent has no offices, warehouses nor property situated in Arkansas.

(4) Orders procured by respondent's salesmen do not become final contracts until signed by Respondent in Tennessee.

(5) Orders are filled and shipped FOB Memphis, Tennessee.

DETERMINATION OF THE CASE BY THE ARKANSAS SUPREME COURT WAS NOT ON A FEDERAL QUESTION.

The Supreme Court of Arkansas in concluding the case stated:

> "(1) That the tax here involved is a sales tax; and (2) that as a sales tax it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in this case." (R-28).

In the case of *Joseph D. McGoldrick v. Gulf Oil Corporation,* 309 U. S. 2-3, 84 Law Ed. 536, this Court pointed out that for a State Court or a Court of Appeals to determine a case on question of Federal Law it must explicitly so state.

> "In the absence of an explicit statement by the Court of Appeals that it annulled the assessment of the tax solely because of violation of the Federal Constitution, we are unable to find that the decision of the highest Court of the State did not rest upon an adequate non-Federal ground. Judicial Code, par. 237 (b), 28 USCA, PAR. 344 (b). *Lynch v. New York,* 293 U.S. 52, 79 L. ed. 191, 55 S. Ct. 16; *Honeyman v. Hanan,* 300 U.S. 14, 81 L. ed. 476, 57 S. Ct. 350; *New York v. Central Savings Bank,* 306 U.S. 661, 83 L. ed. 1058, 59 S. Ct. 790."

We refer to the case of *James Stewart & Company v. Katherine Sadrakula,* 309 U.S. 94-105, 84 L. ed. 596.

In this connection Respondent maintains that the Arkansas Supreme Court in passing on the case was merely construing the application of Acts 154 of 1937 as amended and 386 of 1941 rather than concluding that the Acts were void as being repugnant to the Constitution of the United

States. It is unnecessary to cite the long line of decisions of this Court holding that a Federal question is not presented when a State Court merely construes its own Acts.

IF A FEDERAL QUESTION WAS DECIDED NO CONFLICT WITH THE DECISION IS ESTABLISHED BY PRIOR DECISIONS OF THIS COURT.

The Supreme Court of Arkansas, in passing on the within case, *McLeod v. J. E. Dilworth Co., et al*, 171 S. W. 2d (No. 1, June 15, 1943), page 62, because of the extreme importance attached to its former decision in *Mann v. McCarroll*, 198 Arkansas 628; 130 S. W. (2d) 721, first reconciled its conclusions therein enumerated with the present case. It was first concluded that Act 154 of 1937, which was before the Court in *Mann v. McCarroll*, supra, did not impose a use tax and the sales tax levied thereby was void under the Commerce Clause of the Constitution of the United States insofar as the transactions therein were concerned. It is further stated that the facts in the present case are substantially the same so far as interstate commerce characteristics are concerned, as in the *Mann*, supra, case. It is well to point out at this time that the present case is an attempt to revive the validity of Act 154 of 1937, which was directly settled by the principles announced in *Mann v. McCarroll*, supra, and, as well to validate the provisions of Act 386 of 1941 as applied to out-of-state transactions. Petitioners support such effort upon the theory that this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; 84 Law Ed. 565, and companion cases overruled the *Mann*, supra, case and introduced new law in respect to interstate commerce.

Berwind, in *Berwind-White Coal Mining Co.* case, supra, was a Pennsylvania Corporation engaged in mining coal in said State, but it maintained a sales office in New York City through which means orders were taken for delivery of coal within the city. Sales contracts were actually completed with its New York customers within the taxing area and deliveries were actually made by Berwind within New York City. Thus, it is readily seen that factually the case is wholly dissimilar to the within case. In fact, this Court has always held that because tangible personal property might have at one time been in interstate commerce it could not be relieved of its share of State Tax burdens after commerce had ceased. This is a logical and reasonable construction. No doubt a great percentage of property sold locally in Arkansas was at one time in commerce. Therefore, if a view contrary thereto were established, the State of Arkansas would find very few transactions involving the sale of tangible personal property which would be strictly subject to a sales tax. The Arkansas Supreme Court, in reviewing the *Berwind-White Coal Mining* case, supra, stated:

> "It is our conclusion that the Berwind-White Coal case does not go as far as the appellant contends, and that it introduces no new feature into the law regarding interstate commerce as previously declared. In the Berwind-White Coal case there was involved a retail sales tax of New York City. The Berwind-White Coal Mining Co., a Pennsylvania Corporation, was engaged in the production of coal from its mines in Pennsylvania, and it sold the coal to customers and dealers. It maintained a sales office in New York City. All the sales contracts with the New York customers involved in that case (with two exceptions not germane) were entered into in New York City and required delivery of the coal by the Berwind-White Coal Mining

Company to purchasers in New York City. In other words, there was a place of business in New York City and a delivery in New York City; and, therefore, the tax of New York City was upheld. The United States Supreme Court, speaking by Chief Justice Stone, said:

" 'The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation. An excise for the warehousing of merchandise preparatory to its interstate shipment or upon its use or withdrawal for use by the consignee after the interstate journey has ended is not precluded.'

"The distinguishing point between the Berwind-White Coal case and the cases at bar is that in the Berwind-White Coal case the corporation maintained its sales offices in New York City, took its contracts in New York City and made actual delivery in New York City; whereas, in the cases at bar, the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains that in cases of this type, delivery to the carrier is delivery to consignee. We hold that the Berwind-White Coal case affords the appellant no ground for seeking an over-ruling by this Court of *Mann v. McCarroll.*"

This Court, in passing on the *McGoldrick v. Berwind*, supra, case, pointed out that the tax was conditioned upon a local activity delivery of goods within the State and that such an activity which, apart from its effect on commerce, is subject to the State taxing power. In other words, Berwind could not avoid the tax on coal sales, the contracts for which were completed in New York City, which were delivered by a common carrier from Pennsylvania direct

to Berwind's customers in New York City, while other sales made by Berwind by delivering from its local inventory or coal supply are plainly taxable beyond any question. Such logic is plainly in line with the holding of the Arkansas Supreme Court. Berwind was in business in New York City and actually made the local deliveries. The Arkansas Supreme Court directly ruled on this question involving the same Tax Act as herein involved, namely, Act 154 of 1937, and announced that the taxpayer, if a local or legally authorized vendor corporation, could not escape the tax even on merchandise shipped from its source of supply in another State direct by common carrier to its customers. In this case, *Hollis & Company v. McCarroll,* 200 Ark. 523, appellant was an Arkansas Corporation. It had procured an order in Arkansas for merchandise which was not carried in stock. This order was filled by appellant by ordering from a manufacturer in another State, the merchandise being shipped direct by the non-resident to the appellant's customer. The customer was not obligated to the non-resident shipper. The Arkansas Supreme Court points out that the contract of purchase was made in the State of Arkansas by an Arkansas corporation and the transaction was completely consummated within the State. A comparison of the holding in this case with that of *McGoldrick v. Berwind-White,* supra, obviously proves that the two Courts are in absolute harmony if a Federal question has been decided in the within case. In this respect, we urge that since this Court, in *McGoldrick v. Berwind,* supra, emphasizes the importance of local activity delivery, a foreign corporation not authorized to do business within the taxing area, with no offices or places of business and all deliveries made FOB, a foreign State could not in any sense of the word engage in local activity delivery.

In this respect we refer to the case of *Nelson v. Sears Roebuck & Company,* 312 U. S. 359; 85 Law Ed. 888, wherein Sears was held accountable for the Iowa Use Tax on its mail order business conducted therein. Sears actually maintained retail establishments or places of business in Iowa. The taxpayer, endeavored to distinguish its tax liability as applied to its local retail business from that of mail order business. It was also pointed out that there were other mail order houses doing business in Iowa by mail order only who were not required to pay the Iowa Use Tax, and to require them to do so would place a substantial burden upon Interstate Commerce and result in an impairment of the free flow of such commerce, to which this Court replied:

> "But those other concerns are not doing business in the State as foreign corporations."

Such reasoning is exactly the same as that established in *McGoldrick v. Berwind,* supra, and makes no distinction between sales and use taxes, but establishes local activity, as in this case, actually doing business within the State as the controlling element.

A review of other cases recently decided on use and sales taxes may be referred to for further authority, which are *McGoldrick v. Compagnie Generale Transatlantique* (1940) 309 U. S. 430; *Graybar Electric Company v. Curry,* 308 U. S. 513; and *Nelson v. Montgomery-Ward & Company,* 312 U. S. 373.

Petitioner cites the case of *Illinois Natural Gas Company v. Central Illinois Public Service Company,* U. S. Supreme Court Reports, 314 U. S. 498, 505, 86 Law Ed. 371, calling attention to the fact that this Court has sustained a nondis-

criminatory tax on commodities shipped interstate on a sales contract, not on the ground that the delivery was not a part of interstate commerce, but because the tax imposed was not a prohibitive regulation or burden on that commerce. In support of this statement, this Court quotes the case of *East Ohio Gas Company v. Tax Commission*, 283 U. S. 465; 75 Law Ed. 1171. The *East Ohio Gas Company*, supra, case presents substantially these facts:

(1) Appellant was an Ohio Corporation engaged in the business of furnishing natural gas to its customers in said State.

(2) Gas sold by said Company was produced 25% from its Ohio wells and 75% from its West Virginia and Pennsylvania wells.

(3) Gas deliveries were actually made within the taxing area.

The case presents the question of the application of an excise or occupational tax applied to appellant's receipts from gas produced in West Virginia and Pennsylvania and transported interstate to Ohio. This Court pointed out that when the gas passed from its main distribution lines into its supply lines and is divided into many thousands of relatively tiny streams that the division of the gas is like the breaking of an original package after shipment in interstate commerce so that its contents could be treated and sold at retail. The following comment is noted:

> "It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitable for the service for which it is intended is not interstate commerce but a busi-

ness of purely local concern exclusively within the jurisdiction of the State."

Thus, it is seen, as in the *Berwind-White Coal Mining* case, supra, since Commerce had ceased, the activities of a local corporation in the sales and distribution of such property could be taxed by local authorities. And, returning to the case of *Illinois Natural Gas Company,* supra, this Court, in sustaining a nondiscriminatory tax on the sale to a buyer within the taxing State on a commodity shipped interstate because the tax was not a prohibited burden on commerce had in mind local activities after commerce had ceased and such activities conducted by a corporation domiciled or authorized to do business within the taxing area.

Petitioner also cites the case of *Wiloil Corporation v. Pennsylvania,* 294 U. S. 169, 79 Law Ed. 838, in which case the Commonwealth of Pennsylvania applied a tax of 3c per gallon upon liquid fuels sold and delivered by distributors within the State. Appellant, a Pennsylvania Corporation, having its principal office in Pittsburgh, sold liquid fuels within the Commonwealth, but maintained that it was not accountable for the tax because the fuel sold to its customers within the State was shipped from another State for delivery in tank cars deemed original packages. We quote from Mr. Justice Butler (page 175):

> "Our decisions show that if goods carried from one State have reached destination in another where they are held in original packages for sale, the latter has power without discrimination to tax them as it does other property within its jurisdiction. . . . Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transporta-

tion was not required or contemplated, it may be deemed as merely incidental."

Thus, it is again seen that commerce had ceased and a local sale was consummated by a corporation having its principal place of business within the taxing area, which facts are wholly dissimilar to those now before this Court.

IF A FEDERAL QUESTION WAS DECIDED IT WAS NOT NECESSARY TO THE DETERMINATION OF THE CAUSE.

Bearing in mind that the transactions in question as presented to the Supreme Court of the State of Arkansas were consummated completely in the State of Tennessee, where delivery was made to a common carrier (which is delivery to the consignee), we believe, as urged in our Brief before the Arkansas Supreme Court that it was only necessary for the Court to decide the case on the ground that an Arkansas sales tax could not apply to such transactions and that if any State had the right of taxation it would be the State of Tennessee. A decision of this type unquestionably renders the determination of a Federal question wholly unnecessary. In the case of *Marian S. Honeyman v. Herbert G. Hanan,* 300 U. S. 14; 81 Law Ed. 476, we quote (page 18):

> "Before we may undertake to review a decision of the Court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause."

DeSaussure v. Gaillard, 127 U.S. 216, 234, 32 L. ed. 125, 132, 8 S. Ct. 1053; *Johnson v. Risk,* 137 U.S. 300, 306, 307,

34 L. ed. 683, 686; *Walter A. Wood Mowing and Reaping Mach. Co. v. Skinner,* 139 U.S. 293, 295, 297, 36 L. ed. 193-197, 11 S. Ct. 528; *Eustis v. Bolles,* 150 U.S. 361, 366, 367, 37 L. ed. 1111, 1112, 14 S. Ct. 131; *Whitney v. California,* 274, U.S. 357, 360, 361, 71 L. ed. 1095, 1098, 1099, 47 S. Ct. 641; *Mellon v. O'Neil,* 275 U.S. 212, 214, 72 L. ed. 245, 246, 48 S. Ct. 62; *Lynch v. New York,* 293 U.S. 52, 54, 79 L. ed. 191, 192, 55 S. Ct. 16.

Before closing we wish to call the Court's attention to the rulings of the Supreme Court of the United States as promulgated by order, dated October term, 1941, which amends paragraph 1 of Rule 12 and requires an applicant in petitioning this Court for an allowance of an appeal to first state the statutory provision believed to sustain the jurisdiction, said statement showing that the nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction. Petitioner, on page 3 of Petition for Writ of Certiorari, states that the statutory provision which is believed sustains jurisdiction of this Court is Sec. 240 of the Judicial Code (28 USCA, Sec. 347). This provision relates to petitions for Writ of Certiorari to Circuit Courts of Appeals and Court of Appeals of District of Columbia, etc. Petitioner undoubtedly intended to follow Sec. 237 of the Judicial Code, amended, (28 USCA, par. 344). In this respect we urge that Petitioner also has wholly failed to show rulings of this Court which would bring the case within the jurisdictional provisions relied on.

CONCLUSION.

It is urged that the decision of the Supreme Court of Arkansas in the case of *Murray B. McLeod, Commissioner of Revenue of the State of Arkansas, v. J. E. Dilworth Company* merely construed Acts 154 of 1937 as amended and 386 of 1941 as being inapplicable to the facts presented by the within case and the validity of the Acts in question as being repugnant to the Constitution of the United States was not determined because the necessity of such a determination was unnecessary for a final adjudication. Even though a Federal question is properly presented, the decisions of this Court are entirely consistent with the decision reached by the Arkansas Supreme Court. Therefore, this Honorable Court should deny the petition for Writ of Certiorari to the Supreme Court of the State of Arkansas.

Respectfully submitted,

ALLAN DAVIS,
Counsel for Respondent.
Commerce Title Building, Memphis, Tennessee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. 311

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS
Petitioner

V.

J. E. DILWORTH COMPANY and REICHMAN-CROSBY COMPANY
Respondent

NO. 312

MURRAY B. McLEOD, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS
Petitioner

V.

BINSWANGER AND COMPANY
Respondent

BRIEF OF RESPONDENTS ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

W. H. DAGGETT,
Counsel for Respondents,
REICHMAN-CROSBY COMPANY and
BINSWANGER AND COMPANY.

C. E. DAGGETT
Of Counsel

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STATEMENT OF THE CASE

The statement of the case set forth in Petitioners' brief (Page 1-3) is substantially correct, with the exception of the last two sentences thereof. (Page 3). We contend that the decision of the Arkansas Supreme Court

herein was not, as stated by opposing counsel, "Predicated upon the conclusions of the Court, * * * * that a sales tax could not be levied upon transactions of the sort here involved because it would be a burden on interstate commerce and, therefore, in violation of the Commerce Clause of the Constitution of the United States." The Court simply held that the case was controlled by its prior decision in *Mann vs. McCarroll*, 198 Ark. 628, 139 S.W. 2d 721 (R. 25-26), in which the question of interstate commerce was not in anywise involved. Such being true, a federal question is not here involved.

SUMMARY OF ARGUMENT

The tax levied under Acts 154-1937 and 386-1941, cannot be applied to extra-territorial sales. The tax is applicable only to the "gross proceeds" of "Sales at retail within the state."

Judicial interpretation of the taxing Acts by the Supreme Court of Arkansas limits application to "Retail sales within the state."

The judgment of the Supreme Court of Arkansas (R. 22) affirmed the decree of the Pulaski Chancery Court (R. 19), which held that under facts presented by bill and answer, "Plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff." Therefore, neither the judgment of the Chancery or Supreme Court affirmatively shows that a federal question was necessarily involved, or decided.

ARGUMENT

POINT No. 1.

THE TAXING ACTS ARE LIMITED IN APPLICATION TO SALES MADE WITHIN THE STATE OF ARKANSAS.

(a) The Statutes.

Section 1 of Act 154 of 1937 (App. 15) is:

"Section 1. Title. The title of this Act shall be, 'The Arkansas Retail Sales Tax Law'."

Section 4 (App. 17) is:

"Section 4. The Tax. There is hereby levied upon and shall be collected from all retail sales, as herein defined, a tax of two per cent (2%) of the gross proceeds derived from said sales."

A sale at retail is defined in Section 3 (b) as follows, (App. 15):

"1. The term 'sale at retail' shall mean any transaction, transfer, exchange, or barter by which is transferred for a consideration, the ownership of any personal property, thing, commodity and/or substance, and/or the furnishing or selling for a consideration, any of the substances and things hereinafter designated and defined, when such transfer, exchange, or barter is made in the ordinary course of the transferror's business and is made to the transferee for the consumption or use or for any other purpose than for resale."

Section 3 (d) provides (App. 16):

"The term 'gross proceeds' shall mean the amount received in money, credits, property or any other money's worth in consideration of *sales at retail within this State* without any deduction on account of the cost of the property sold, the cost of materials used, or any other expense whatsoever, nor shall any deduction be allowed for losses."

Section 3 (e) (App. 16) defines:

"The term 'retailer' shall mean any person, persons, partnerships, firm or corporation engaged in 'sales at retail'."

Section 4 (E) (App. 17) further reveals the legislative intent:

"(E) Where there are adjoining cities or incorporated towns which are separated by a State line, the taxes and licenses to be paid by dealers in and on sales and services in such adjoining city or incorporated towns on the Arkansas side of the State line shall be at the same rate as provided by law in such adjoining State, if any, not to exceed the rate provided in this Act."

Therefore, as is perfectly obvious, the tax is laid on, and limited to, the "gross proceeds" derived from "Sales at retail within this state;" and the "Tax Collector" is the "Retailer" who is defined as any person engaged in "Sales at retail" (within this state).

Necessarily, then, the Legislature having specifically said that the tax be laid on sales within the state, it would follow that a sale made without the state would be excluded. That such was the intent is further evidenced by the provisions of Section 4 (E), (last quoted), which is by way of exception and in recognition of the existence of the situation here presented; but the exception is limited to cities located on state lines.

The Supreme Court of Arkansas said that the tax levied under Act 386-1941 was of the same kind and character as that levied under Act 154-1937. (R. 26). Moreover, Article 1 of the regulations promulgated by the Commissioner under Act 386 of 1941, (inadvertently

omitted from the Record by Petitioner), provides as follows:

> "Amount and nature of tax—by whom paid, by whom collected. The tax levied by the Act is two per cent of the gross proceeds or gross receipts derived from all sales *within this state.*"

Act 386 does not, either in express terms or by implication, purport to tax sales of personal property which are made in another state, in which the transmutation of both the title and possession takes place, even though the property, pursuant to the sale, or as a result of the sale, is brought into the state. To the very contrary, the express terms of the Act show conclusively that the Legislature did not intend to tax such sales, and the provisions of the Act are inapplicable to such sales. For this reason, the Federal Commerce clause could never be involved.

Specific taxes are levied on "gross receipts derived from sales." The term "seller" is defined to mean "every person making a sale in an established business as here defined." And the term "established business" is defined to mean "any business operated or conducted by any person in a continuous manner for any length of time from an established place and in an established manner." This definition contemplates an established place of business in Arkansas. Assuredly, it could not be held to mean places of business in the other forty-seven states, for the Legislature has no power over such businesses; and the presumption is that it did not intend, or attempt, to exercise a power which it did not possess.

Again, Section 6 (App. 42) requires "Sellers" to keep records in this state. As the Legislature lacked power

to require "Sellers" who had no established places of business in the state to keep their records therein, the presumption is that it was intended to tax only those sellers who have established places of business in Arkansas and where all of their actual business operations are conducted, but who have executive or managerial offices outside the state where their general records are kept.

Section 7 (App. 43-44) provides that a seller of admissions to places of amusement, whether for entertainment or for recreational or athletic events, shall pay the tax imposed by the Act. In the very nature of things, this could not apply to places of amusement beyond state confines, and the Legislature did not intend it to so apply.

In this connection, we call particular attention to a somewhat curious feature of the complaint filed in the Chancery Court. (R-13). Therein it is alleged:

> "The defendant, Reichman-Crosby Company, is a corporation organized under the laws of the State of Tennessee, with its principal place of business in the City of Memphis, Tennessee. It is not qualified to do business in Arkansas and has no place of business in this state, *but it engages in business activity as defined by Regulation No. 16, promulgated under Act No. 154 of 1937, as amended and as defined by Article 27 of the regulations promulgated under Act No. 386 of 1941.*"

This allegation utterly ignores the terms of the taxing Acts and predicates the right of recovery on the terms of Article 27 of the regulations promulgated by the Commissioner under Act 386. Such regulation goes far be-

yond the terms of the Act, and was designed and specifically drafted in an effort to make extra-territorial sales taxable. No warrant for the regulation can be found in the Act itself.

In *Mann vs. McCarroll*, 198 Ark. 628, defendant, Mann, alleged "that Act 154-1937 did not authorize the levy or collection of a sales tax—on property purchased in other states for *use* in Arkansas." He further alleged, "But, on the contrary, that the levy of the tax was upon retail sales only." (Pg. 631). Intervenors, Howe, designedly and purposely alleged that the Act as interpreted and attempted to be applied by the Commissioner "would be wholly void as a sales tax for the reason that the state is without power to levy a tax upon sales, or purchases, made beyond its jurisdiction, or upon sales, or purchases, of goods in other states which thereafter entered interstate commerce." Thus, the principal issues were presented. First, the "use tax"; and, secondly, that the Act could not be held applicable to extra-territorial sales because it was limited in application to "sales within the state." The Court disposed of these principal issues by holding, (1) that Section 4 (f) did not provide a use tax; and (2) that the Act, viewed in its entirety, applied only to "sales at retail within the state." Therefore, merely by a process of elimination, the interstate commerce question was not reached, or decided, and the very cornerstone and foundation of the decision is the statement of the Court that "The only tax, therefore, that is imposed is a sales tax." (Pg. 636). Most assuredly, then, the power or intent of the State to tax a sale consummated beyond territorial limits, even though the property involved was subsequently transported therein for

use and consumption, was expressly and positively denied.

We further submit that in the *Mann case,* in the use of the following language quoted therefrom, the Court expressly said that the tax levied under Act 154 did not apply to sales such as are involved in the case at bar. (Pg. 639-640):

"It is also argued that merchants are entitled to have this construction placed upon this Act of the Legislature for their protection, in order that local citizens will not make purchases abroad in order to avoid the sales tax. We acknowledge the forcefulness and cogency of these statements and the only answer we desire to make to them is that they are proper arguments to be made to the legislative assemblies, and they become proper to present to judicial tribunals only when it is apparent from the language of the Act itself that it was the legislative intent so to safeguard the public revenues and to protect one class of its citizens against the alleged wrong doing by others in the evasion of taxes by trading in tax-free areas.

"Our attention has been called to the fact that the Legislature was not unmindful that people might be tempted to trade in other states in order to avoid the taxes imposed. Provisions have been made for the reduction of taxes where the local citizen could secure an advantage by merely going across the state line to make his purchases. Our attention has heretofore been called to certain matters of this kind and has been given due consideration, but they are problems for legislative solution and not for correction by judicial interpretation. *Wiseman v. Phillips*, 191 Ark. 63, 84 S.W. 2d 91. *Kibler v. Parker*, 191 Ark. 475, S.W. 2d 925."

This Court will realize, of course, that in considering the case at bar, the Arkansas Supreme Court had access to, and took judicial knowledge of, the record in the Mann case, and that it presented for decision not only the application of the alleged "use tax provision" (Section 4 (f) - 154), but also the positive question presented by intervenors, Howe, whether the Act could be held to apply to sales consummated extra-territorially. If, as we contend, that was the principal question decided in the Mann case, and that it did not involve, or have any relation to the interstate commerce question, and if, as stated in the opinion, the case at bar is controlled by the Mann case, then it should necessarily follow that the instant case does not present a federal question. Seemingly, it should not be necessary to argue that the federal question was not considered or decided in the Mann case. Judge Baker said:

> "As we have heretofore stated, it is conceded that if this provision of the Act must be treated as a sales tax on sales made in other states, it is illegal and unenforceable."

This statement was made by the writer of the opinion to serve but one purpose, that is, to show that on presentation of the case, it was agreed by all parties that the interstate commerce question was neither presented for decision, nor decided. In fact, the opinion concluded with the following statement:

> "From what we have said, we think the other interesting questions stated in the beginning of this opinion need not be discussed."

POINT II.

THE DECISION OF THE ARKANSAS SUPREME COURT IS NOT, OF NECESSITY, BASED ON AN INTERPRETATION, OR DETERMINATION, OF THE COMMERCE CLAUSE.

It is settled that before this Court can pronounce a judgment of a State Court to be in conflict with the Federal Constitution, it must be made to appear that the decision sought to be reviewed did, of necessity, involve determination of the federal question.

In *Adams vs. Russell*, 229 U. S. 353, 59 L. ed. 1224, 33 S. Ct. 846, it is said:

> "In *Bachtel v. Wilson*, 204 U.S. 36, 41, 42, 51 L.ed. 357, 359, 360, 27 Sup. Ct. Rep. 243, we said, by Mr. Justice Brewer, that before we can pronounce a judgment of a State Court to be 'in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was.' The case involved the consideration of a state statute which presented two questions, one of which, at least, presented no matter of a Federal nature, and in respect to each of which something might be said one way and the other, and until it was shown what the Supreme Court did in fact decide, it was impossible to hold that the section as construed by it was in conflict with the Federal Constitution. Under these circumstances, it was held that this Court had no jurisdiction, and the writ of error was dismissed. *Johnson v. Risk*, 137 U.S. 300, 34 L.ed. 683, 11 Sup. Ct. Rep. 111, was cited. No opinion was given by the State Court in *Bachtel v. Wilson*, nor in the cited case. In neither case, therefore, did the record disclose the specific ground upon which the

Court proceeded. In such case, we said in *Johnson v. Risk,* by Mr. Chief Justice Fuller, that when the application of a state statute in a matter purely local was involved, if a plaintiff in error wished to claim that the cause was disposed of by the decision of a Federal question, he should obtain the certificate of the Supreme Court to that effect, or the assertion in the judgment that such was the fact. *DeSaussure v. Gaillard,* 127 U.S. 216, 32 L.ed. 125, 8 Sup. Ct. Rep. 1053, was adduced as deciding that to give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively not only that a Federal question was presented for decision, but that its decision was necessary to the determination of the cause, and that it was actually decided, *or that the judgment as rendered could not have been rendered without deciding it.*"

In *Arkansas Southern Railway Co. vs. German National Bank,* 207 U.S. 270, 52 L.ed. 201, 28 Sup. Ct. 78, Mr. Justice Holmes, in speaking for this Court, said:

"But, according to the well-settled doctrine of this Court with regard to cases coming from State Courts, unless a decision upon a Federal question *was necessary to the judgment,* or in fact was made the ground for it, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question *is made a ground, if the judgment also is supported upon another which is adequate by itself,* and which contains no Federal question, the same result must follow, as a general rule. Moreover, ordinarily this Court will not inquire whether the decision upon the matter not subject to its revision was right or wrong. *Murdock v. Memphis,* 20 Wall. 590, 22 L.ed. 429; *Hale v. Akers,* 132 U.S. 554, 33 L.ed. 442, 10 Sup. Ct. Rep. 171; *Leathe vs. Thomas,* Nov. 11, 1907 (207 U.S. 93, ante, 30, 28 Sup. Ct. Rep. 30)."

The judgment of the Supreme Court of Arkansas, (R. 22), is as follows:

> "These causes came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County and were argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause."
>
> "It is, therefore, ordered and decreed by the Court that the decree of said Chancery Court in this cause be and the same is hereby in all things affirmed with costs."

The judgment of the Chancery Court of Pulaski County (R. 19) states:

> "On the facts alleged in the plaintiff's complaint, admitted in the answer of the defendant, and upon the facts alleged by way of affirmative defense in defendant's answer, not denied by plaintiff, the Court finds that plaintiff cannot enforce against, nor recover from, the defendant any taxes alleged to be due by defendant in the complaint filed by plaintiff.
>
> "Therefore, it is by the Court considered, ordered and adjudged that the complaint of the plaintiff be, and is, hereby dismissed."

It is, therefore, apparent that neither the judgment of the Chancery Court or the Supreme Court of Arkansas affirmatively shows that a Federal question was necessarily involved, or decided.

In petition for rehearing, filed herein, (R. 28-29), counsel for Petitioner requested the Court to "clarify its opinion to show clearly that its opinion affirming the decision of the lower Court, holding that the Commis-

sioner * * * cannot collect the taxes on the transactions involved, is based solely on the proposition that a sales tax laid upon a purchaser cannot be collected on transactions in interstate commerce." The Court refused to modify the opinion. Evidently, counsel then held the view, for which we here contend, that the Arkansas Supreme Court did not base decision on the commerce clause. At least, counsel seemed to be in doubt and thought the opinion should be "clarified." In any event, although we steadfastly maintain that by no proper construction can it be said that the decision rests on any basis other than the positive declaration that the former decision in the Mann case controlled, nevertheless, if there be any doubt as to whether a Federal question formed the basis for decision, then, as we understand the settled rule, such doubt must be resolved in favor of Respondents, and the petition must be denied.

THE BERWIND-WHITE CASE

Counsel seems to rest his whole case on the decision of this Court in *McGoldrick vs. Berwind-White Coal Mining Company*, 309 U.S. 33, 84 L.ed. 565, 60 S. Ct. 388. In our opinion, it is without any bearing whatsoever.

It is, of course, naught more than the statement of an elementary rule to say that when the "Seller," in Memphis, delivered the goods to a common carrier, consigned to the purchaser in Arkansas, the sale and delivery to the purchaser was thereby accomplished, both in law and in fact.

> *Louisville & N. R. Co. v. United States*, 267 U.S. 222, 45 S. Ct. 233.

The Berwind-White case, as well as its companion cases cited in brief of opposing counsel, involved facts entirely dissimilar and unrelated to the facts in the cases at bar. We quote the statement of facts made by the New York Court of Appeals, (281 N.Y. 610, 22 N.E. (2d) 173):

> "Petitioner, a Pennsylvania corporation, engaged in marketing and distributing bituminous coal *in New York City,* claimed immunity from the provisions of the sales tax law under the commerce clause of the Federal Constitution because the sources of the coal were in another state, *although all of the contracts were made, signed and executed within the City of New York, and possession and title were transferred within the City of New York.* Petitioner also contended as to a small portion of its sales that the fact that the contracts named delivery points outside of New York City, although actual delivery occurred within the City, resulted in the consummation of the sales outside of the City and so placed them beyond the scope of the law."

As is perfectly apparent, both by the facts statement above quoted, and as also set out in the opinion of this Court, the Berwind-White Company maintained a sales office in the City of New York, where they made contracts for the delivery of coal, and where, on a date subsequent, the possession and title thereof was transferred. In other words, every act done in the City of New York which would have *conditioned* the tax on a local sale, was, in the case at bar, done or performed in the City of Memphis. The offer, acceptance, and delivery were made within the territorial limits of New York, and, of course, were activities within its taxing power. In plain truth and unvarnished fact, the sales and deliveries were made

within the City of New York, and were, therefore, subject to its taxing powers. As we construe it, the decision rests solely on the ground that the City could impose, and had imposed, a tax upon local activities which occurred within the territorial limits of the taxing agency. This Court said:

> "The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer, for consumption of tangible personal property and measured by the sales price. * * * It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, consummated there, for the transfer of title, or possession."

But it is different in the cases at bar. The tax levied under both the New York and Arkansas Acts is conditioned upon the transfer of title, or possession. But, in the cases at bar, the Acts which "*conditioned*" the tax did not occur within the state, but did occur in Memphis, where the title and possession of the property passed.

What is the nature of the tax involved, and ultimately applied, in the Berwind-White case? Determination of this question serves to clarify the further question of the applicability of the decision, (if any it has) to the cases at bar. The New York Act provided:

> "The tax imposed hereunder shall have application only within the territorial limits; and, this Act shall not authorize the imposition of a tax on any transaction originating, and/or consummated outside of the territorial limits of (the city), notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Necessarily, under this provision, activities within the territorial limits, which conditioned the tax, must have occurred therein. The tax was laid on "purchasers for consumption," measured by the "Amount of the receipts from every *sale* in the City." "Sale" was defined as "any transfer of title or possession, by any manner, or method, or any agreement therefor." Therefore, in its very nature, design, application and effect, as is plainly manifest, the tax set up under the Act was a *"sales tax."* Its purpose and design was to tax "sales," as defined, made within the taxable limits. And, so conforming it, its nature and character are not in anywise doubtful.

We further note (and emphasize) that in the Berwind-White case, there was involved two sales in a category similar in respect to the cases at bar. Austin-Nichols and Co. and The New England Steamship Company submitted to the New York office of the Berwind-White Company offers to purchase coal. As to Austin-Nichols, the delivery was to be made f.o.b. mines in Pennsylvania. As to the Steamship Company, delivery was to be completed at the pier of the Company in Jersey City. This Court refused to pass on these two sales and the case was remanded to the New York Court of Appeals for determination of the validity of the tax alleged to be due thereon. Thereafter, final judgment was entered in the New York Court of Appeals, in which it was conceded that the sales so made did not fall within the provisions of the taxing Act because they were made beyond territorial limits of the taxing agency.

In the Berwind-White case, this Court said that, "The only relation to commerce" arose from the fact that immediately preceding *transfer of possession within the*

state, the merchandise had been transported in interstate commerce and *brought to its journey's end.* Is the "relation to commerce" there involved, wherein the contracts which carried the title and right to possession to the purchaser were executed within the limits of the taxing agency, in any wise comparable to the "relation to commerce" herein involved, wherein every activity, which would condition the tax if the sale had been made in Arkansas, actually occurred in the City of Memphis, beyond the territorial limits? As we understand it, every activity occurring in the instant cases, in their combined and cumulative effect, have been held, since time immemorial, to constitute interstate commerce. Citations are deemed unnecessary.

The commerce clause (Sec. 8, Ar. 1) prohibits multiple taxation for the reason that such mode of taxation would place a burden on interstate commerce. If Arkansas be allowed to tax gross receipts on sales of goods made in Tennessee, upon delivery thereof to an Arkansas purchaser by his carrier agent who accepted delivery for him in Tennessee, then it ought to be conceded that the sale would also be taxable in Tennessee, where all acts which tended to consummate the sale occurred. Multiple taxation would, therefore, necessarily occur and the following decisions would be applicable. As said by the Supreme Court in *Adams Mfg. Co. v. Storen,* (304 U.S. 307, 58 S. Ct. 913):

> "We conclude that the tax is what it purports to be—a tax upon gross receipts from commerce. Appellant's sales to customers in other states and abroad are interstate and foreign commerce. The Act, as construed, imposes a tax of one per cent on every dollar received from these sales."

"The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods were sold, as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of and burden upon, interstate commerce, prohibited by Art. 1, Sec. 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and non-discriminatory character of the exaction, but it is settled that this will not save the tax if it directly burdens interstate commerce."

In *Simpson vs. Gundry,* 297 Mich. 403, the Court said:

"Sanction of the claim made by the State would make plaintiff a collector of a tax, in behalf of the State, upon merchandise, manufactured, sold and in the course of interstate commerce, delivered in Chicago for carriage to owners thereof in the State of Michigan, and such cannot be done, for the law-making arm of the Legislature, *and much less that of a mere administrative official,* cannot reach into another State and mandate persons there to so serve. The use tax Act does not accomplish any such thing!

"In the case at bar the State seeks to impose a burden on interstate commerce, not in any manner connected with intrastate commerce, and this may not be done. Plaintiff needed no authorization to do business in the course of interstate commerce in this State and leave to do business in this State, unless an intrastate business is carried on and the in-

trastate and interstate business become associated, does not subject interstate commerce to any State imposed burden.

"Under the mentioned Federal decision, a foreign corporation doing business within this State, subject to a sales tax, is liable for the use tax upon goods shipped into State to residents as, in such case, the use tax is complementary as associated with the sales tax and not considered a burden upon what would otherwise be interstate commerce. The business here involved, upon which the State seeks to sustain the use tax, is the very business which we held in *J. B. Simpson, Inc., v. O'Hara; supra*, (277 Mich. 55) was not subject to the sales tax, and upon that point that decision is *res judicata*. So, disassociated, the business is strictly interstate commerce upon which the State may not impose the burden of the use tax or compel the plaintiff to collect same."

This Court denied certiorari (*Brown vs. Simpson*, 314 U.S. 674).

CONCLUSION

We, therefore, respectfully submit, for the reasons hereinbefore stated, that the petition for Writ of Certiorari should be denied.

W. H. DAGGETT,
Counsel for Respondents.

C. E. DAGGETT,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas, Petitioner,

VS.

J. E. DILWORTH COMPANY and RIECHMAN-CROSBY COMPANY, Respondent.

SEPARATE BRIEF FOR RESPONDENT,
J. E. DILWORTH COMPANY

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VS.

J. E. DILWORTH COMPANY and RIECHMAN-CROSBY COMPANY, Respondent.

SEPARATE BRIEF FOR RESPONDENT, J. E. DILWORTH COMPANY

STATEMENT OF THE CASE

The validity of Acts 154 of 1937, as Amended, and 386 of 1941, of the General Assemblies of the State of Arkansas as applied to the particular transactions here, is the subject of the controversy.

Respondent is a Tennessee Corporation with its principal place of business in Memphis, Shelby County, Tennessee, which is separated from Arkansas by the Mississippi River. It is not qualified to do business in Arkansas and has no sales offices or other places of business in said state.

(a)

Orders for machinery and mill supplies are procured in Arkansas, principally by two travelling representatives of Respondent, both domiciled in the City of Memphis, Tennessee, and who, as traveling representatives, cover in their regular routes of solicitation States other than Arkansas. All orders taken by the traveling salesmen are subject to the approval and acceptance of the Memphis Office, and the order forms so specify.

If the order is approved, and accepted by the Memphis Office, it is filled and shipped F.O.B. Memphis, Tennessee, title to the property being relinquished upon delivery to a common carrier. The traveling representatives have no authority to, and do not, collect accounts; their express authority being specifically limited to the solicitation of orders which must be subsequently approved and accepted by proper central office authorities. No title retaining contracts nor vendors lien notes are maintained in the State of Arkansas, and the only recourse Respondent possesses for the collection of its accounts is a claim for an open Accounts Receivable. The respondent is in the general interstate business.

(b)

Respondent receives orders by mail and telephone from customers in Arkansas, which, if accepted, are filled, and the merchandise delivered to a common carrier in Memphis, the purchaser paying the freight.

(c)

Respondent also makes sales of goods or merchandise to purchasers who come from Arkansas and obtain delivery of such goods or merchandise at its place of business

in Memphis, which goods or merchandise are taken by the purchaser into the State of Arkansas for use or consumption (R. 2, 3).

Petitioner has summarized Respondent's position (Petitioner's Brief, Page 2).

The Supreme Court of the State of Arkansas concluded: (1) That the tax here involved is a sales tax; and (2), that as a sales tax it would be a burden on interstate commerce for the tax to be imposed and collected under the facts in these cases: *McLeod v. J. E. Dilworth Co.* and *Riechman-Crosby Co.*, 171 S. W. (2d) 62 (*not yet officially reported*). In holding that the State could not impose and collect the tax, the effect is that the purchaser (against whom the tax is *imposed*) is not liable; hence the seller cannot be compelled to *collect*.

SUMMARY OF ARGUMENT

A. **HISTORY OF THE TAX.**

B. **McGOLDRICK V. BERWIND AND COMPANION CASES DO NOT SUPPORT THE TAX.**

C. **A TAX LEVIED AND COLLECTED IN ARKANSAS FOR SOLICITING BUSINESS VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.**

D. **THE TAX VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

ARGUMENT

(*Italics Added*)

A. HISTORY OF THE TAX.

Act 154 of 1937 levied a retail sales tax only. "There is no language whereby a use tax was levied or by which such fact might be determined by the actual or necessary implication." (*Mann v. McCarroll*, 198, *Ark.* 628). In *Mann v. McCarroll*, supra, the Commissioner of Revenues urged that a sales tax levied in Arkansas or sales made in another State, thereafter brought into Arkansas for consumption or use was void;, "substantially the appellee (Commissioner of Revenues) argues that no sales tax could be levied on a sale made in another State which was thereafter to be brought into the State; that such a tax, that is, a sales tax on a sale made in another jurisdiction, would be an unwarranted burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U. S. C. A. Const. Art. I, Par. 8, Cl. 3, and, therefore, invalid." (*Mann v. McCarroll*, supra), and the Arkansas Supreme Court so held.

Act 386 of 1941, titled, "Gross Receipts Tax" is a retail sales tax substantially the same as Act 154 of 1937, which it repealed. (*McLeod v. Dilworth*, 171 *S. W.* (2d) *Page* 64).

Petitioner, Commissioner of Revenues, now wishes to reverse his former position and asserts that neither Act 154 of 1937 (originally argued contra) nor Act 386 of 1941, would be invalid when applied to sales made in other states, the property sold being subsequently consumed or used in Arkansas, since the "new doctrinal

trend" announced by this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33 and companion cases.

B. McGOLDRICK V. BERWIND-WHITE AND COMPANION CASES DO NOT SUPPORT THE TAX.

Certiorari was granted in the *McGoldrick v. Berwind*, supra case, upon a petition which challenged that the decision of the New York Supreme Court was not in accord with the decisions of this Court in *Banker Bros. Co. v. Pennsylvania*, 222 U. S. 210; 56 L. ed. 168, 32 S. Ct. 38; *Wiloil Corp. v. Pennsylvania*, 294 U. S. 169; 79 L. ed. 838, 55 S. Ct. 358.

We maintain that the legal reasoning attached to *McGoldrick v. Berwind-White*, supra, and companion cases, is logical and easily reconciled with the thought attached to *Banker Bros. v. Pennsylvania*, supra, and *Wiloil Corp. v. Pennsylvania*, supra.

Banker Bros. Co. v. Pennsylvania, supra, turned on the proposition that a corporation *doing business* within the taxing *territory was the actual vendor and not acting* as agent for seller not doing business in the taxing State.

Banker Bros. Co. was doing business in Pennsylvania where the contract was made by Banker Bros. "Banker Bros. Co. had the title, and delivered it to the buyer on his paying the balance of the purchase money. Compare *Dozier v. Alabama*, 218 U. S. 124, 54 L. ed. 965, 28 L. R. A. (N. S.) 264, 30 Supreme Court Rep. 649."

The same principle is announced in *Wiloil Corp. v. Pennsylvania, supra, where the seller is doing business,*

makes the contract and delivery in the taxing state. This case also involves the application of the tax to property termed "original package" after it has come to rest in the taxing state, thus following the line of decisions holding valid a use tax on storage or withdrawment for use of gasoline after it has come to rest and commerce has ceased. *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 76 L. ed. 1233; *American Steel & Wire Co. v. Speed,* 192 U. S. 500, 48 L. ed. 538; *Edelman v. Boeing Air Transport,* 289 U. S. 249, 77 L. ed. 1155; and *Brown v. Houston,* 114 U. S. 622, 29 L. ed. 257. Normally the type tax involved on transactions of this kind are occupational taxes levied for the privilege of taking the item from storage or placing the property through the channels of sale. This type tax is not in any degree an advalorem levy, but a privilege or excise tax and has always been held good because commerce, if the propetry was in commerce, has ceased. Likewise, we have a long line of *decisions holding that* a use tax or a levy for the privilege of consuming personal property, is valid. However, these taxes, in most instances, are enacted by State Legislative bodies, complementary to a sales tax. This tax, being a direct levy against the consumer for the use of tangible personal property, depends for its validity on the right of the State to levy an ad valorem tax of this nature because a tax for the use of the item is an exaction against the property itself.

But, since the decisions of *Banker Bros. Co. v. Pennsylvania,* supra, and *Wiloil Company v. Pennsylvania,* supra, it has been pointed out that it makes no difference whether the tax be on the use or consumption or a retail sales tax (that is, provided, of course, a use tax is valid

under the laws of the State levying the tax insofar as commerce is concerned, since no burden can be imposed after commerce has ceased. We do not quibble with this holding. The great bulk of personal property bought and sold has at some time been in commerce. Only a very few items are actually grown, manufactured or constructed and disposed of in the State of origin without passing in commerce. Therefore, if the Courts should hold that States could not levy taxes touching personal property that had at any time been in commerce, no doubt local governments would be almost wholly without property subject to being taxed.

In *Berwind-White*, supra, New York City levied a tax on receipts from sales *in the City of New York* "two percentum upon the amount of the receipts of every sale in the City of New York." (p. 43). *But in all these cases, including Banker Bros., supra, and Wiloil Corp., supra, the seller is doing business in the state where the delivery is made.* This also attached to all the companion and similar cases; *McGoldrick v. Felt & Tarrant Manufacturing Co., McGoldrick v. A. H. Du Grenier, Inc.*, 309 U. S. 70; *Nelson v. Sears Roebuck & Co.*, *312 U. S. 359*, and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373. The fact that sellers were not authorized to business did not change the situation.

The decisions of the Arkansas Supreme Court are identical. See *Mann v. McCarroll*, supra, and *McLeod v. Dilworth*, supra, where the seller *is not* doing business; and *Hollis & Co. v. McCarroll*, 200 Ark. 523, where the seller *is* doing business in Arkansas. The *Hollis*, supra, case, applies to Act 154 of 1937, the very Act

under question in this appeal. Compare this case to *Banker Bros. Co. v. Pennsylvania,* supra. They are almost identical, both factually and as to the declaration of law. Also note the Arkansas Supreme Court, when the *Hollis* case was decided, had before it this Court's decision in *McGoldrick v. Berwind-White,* supra, and companion cases, and the case was decided on the determinative law of this Court decreed in *McGoldrick v. Berwind-White,* supra. *But the Arkansas Supreme Court also had before it the McGoldrick v. Berwind-White case when the present case was decided. The law is the same, but the facts are not.*

The New York taxing Act is similar in most respects to the Arkansas Acts. Or perhaps we should say the Arkansas laws and regulations since the *Berwind-White* decision are very similar, indeed, to the New York Laws. Since the *Berwind-White* decision the Arkansas acts have been rehabilitated and remodeled by regulations promulgated by the Commissioner in order to mold the Arkansas Acts to fit the decision. So we can now assume for the present purpose that it falls upon us to distinguish the present case factually from the *Berwind-White,* supra case. Two distinguishing characteristics cause the law in *Berwind-White* to be inapplicable here.

First: *Berwind-White* maintained a place of business and actually transacted its business in New York City. Respondent has no place of business in Arkansas and transacts no business there.

Second: *Berwind-White's* contracts were entered into in New York City, where *Berwind* made local delivery causing the sale to be consummated there. Respondent's contracts were made in Memphis, Tennessee, where delivery was made, causing the sale to be consummated in Tennessee.

"Doing Business"

No question of "doing business" is presented in the *Berwind-White,* supra decision, since *Berwind-White* in New York, actually maintained a place of business, an inventory of merchandise for sale, and there received and accepted orders.

We find no general rule which will determine in all cases the sufficiency of activity of a corporation necessary to constitute "doing business." In the instant case the act of soliciting business is the only activity of Respondent through its agents which might be construed as "doing business." The determination of this question is for the State Courts where the action was brought. *Denver and R. G. R. Co. v. Rosler,* 49 L. R. A. 77, 41 C. C. A. 22, 100 Fed. 738, and *Truck Hand v. Chicago and A. R. Co.,* 115 N. Y. 437; 22 Northeastern 360.

In a later section of this brief we will show there was no delivery in Arkansas by Respondent or anyone else. Therefore, if the transactions are to be taxed or if Respondent is to be held accountable for the collection and remittance, it must be because of its activity in soliciting business which brings us to the point of law upon which the State Supreme Court saw fit to turn its decision.

C. A TAX LEVIED AND COLLECTED IN ARKANSAS FOR SOLICITING BUSINESS VIOLATES THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

We assume for the purpose of arguing this point that the "taxable event" is the act of soliciting business.

The Arkansas Supreme Court has consistently held that a foreign corporation would not be "doing business" in

Arkansas unless the general nature and character of its activities was such as to warrant an inference that its transactions were intra state in character and it had subjected itself to local jurisdiction. *Sillin v. Hessig-Ellis Co.*, 181 Ark. 386. Here the Court quotes and approves from 60 A. L. R. p. 996 "the soliciting of orders for goods within a state by the agent of a foreign corporation and the shipment of goods pursuant to such orders by the corporation from another state to the purchaser, do not constitute doing business within the State, so as to subject the corporation or its agent to a local statute prescribing conditions of doing business within the State; since such transactions are in interstate commerce and are not subject to regulations by the State." Also, in *Coblentz and Logsdon v. L. D. Powell Company*, 148 Ark. 151, quoting from the opinion, p. 155: "The contract for the sale of these books was consummated when the order therefor was accepted by the appellee at its home office in a foreign state and the books delivered there to the transportation company for shipment to appellants."

L. D. Powell Co. v. Roemtell, 157 Ark. 123;
S. B. Wilson Telephone Co. v. John A. Roebling's Sons Co., 159 Ark. 635;
Crawford v. Louisville Silo & Tank Co., 166 Ark. 91;
H. J. Heinz Co. v. Duke, 169 Ark. 180;
Peoples Tobacco Co. v. American Tobacco Co., 246 U. S. 79;
Rogers v. Arkansas, 227 U. S. 401;
Linograph Co. v. Lazon, 175 Ark. 194.

If it is necessary for the seller to be "doing business" in the State to such a degree as to come under the Act, we submit that the question of "doing business" is a question of local law and the Arkansas Supreme Court in

holding as it did, that is, the tax would be a burden on interstate commerce if imposed and collected under the facts, held the Respondent was not "doing business." Such logic springs from the fact that if the Arkansas Supreme Court believed Respondent was "doing business" interstate commerce would not be involved. Precisely the holding of the Arkansas Court in *Hollis & Co. v. McCarroll*, supra, where the seller was "doing business" hence no violation of the Commerce Clause of the Federal Constitution.

This Court has always been committed to the doctrine that a State Tax levied on the privilege of soliciting business by a foreign agent or corporation would infringe the Commerce Clause. *Robbins v. Taxing District*, 120 U. S. 489, 30 L. ed. 694; *Rogers v. Arkansas, Supra*; *Crenshaw v. Arkansas*, 227 U. S. 389; *Western Oil Refrigerator Co. v Lipscomb*; 244 U. S. 346, *Stockyard v. Morgan*, 185, U. S. 27; *Dozier v. Ala.* 218 U. S. 124; and many other cases.

Commerce was contemplated when the orders were taken by Respondent's agent. This still seems to be the test. *Crenshaw v. Arkansas*, supra. See also the case of *Emert v. Missouri*, 156 U. S. 296, where the agent was selling and delivering. This rule of law is plainly followed in *McGoldrick v. Berwind-White*, supra, and related cases. See also *Howe Machine Co. v. Gage*, 100 U. S. 676; *Baccus v. State of Louisiana*, 232 U. S. 334; and *Wagner v. Covington*, 251 U. S. 95. *But* these cases deal with selling and delivering tangible personal property which has been the law for a century when applying local privilege taxes to itinerant vendors or peddlers, and are certainly inapplicable to soliciting orders by an agent of a foreign corporation.

Respondent seeks no protection from the laws of the State of Arkansas and consequently is not "doing business" in said State to such a degree either with or without authority as to entitle the State to require it to collect and remit taxes. Then, if the "taxable event" is soliciting business, respondent is not accountable. This moves us to the next point of discussion.

D. THE TAX VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Respondent's contracts were entered into in Memphis, Tennessee, where delivery was made, causing the sale to be consummated there. It is urged by petitioner that as in the *McGoldrick v. Berwind-White*, supra, case the tax here is dependent upon a *local activity* delivery of goods within the state upon their purchase for consumption. But delivery is a part of the contract of sale and delivery to the purchaser is completed in Tennessee. It is stipulated that title passed to the purchaser in Tennessee where delivery is made to the purchaser's agent, a common carrier. If this was not stipulated it is the law that delivery by a vendor to a common carrier is delivery to the vendee. "While according to common usage, delivery by a vendor to a carrier is, in the absence of a special agreement to the contrary, delivery to the vendee." *U. S. v. Andrews*, 207 U. S. 229; *Louisville & N. R. Co. v. U. S* 267 U. S. 395; *D. L. & W. Ry Co. v. U. S.*, 231 U. S. 363.

A State cannot tax property beyond its jurisdiction without violating the due process clause of the Fourteenth Amendment. *Union Refrigerator Transit Co. v. Ky.*, 199 U. S. 194; *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83; *Frick v. Penn.*, 268 U. S. 473; *James v. Dravo*

Contracting Co., 302 U. S. 134; *Hans Rees' Sons v. N. C.*, 283 U. S. 123; *Shaffer v. Carter*, 252 U. S. 37; *Surplus Trading Co. v. Cook*, 281 U. S. 647.

If the "taxable event" is the local activity delivery of the tangible personal property which is maintained by Petitioner and supported by the *McGoldrick v. Berwind-White*, supra, case, then, in this event the State of Tennessee, only can tax these transactions.

CONCLUSION

If the "taxable event" is the act of solicitation, the tax cannot be enforced because it would infringe the Commerce Clause of the Constitution. *Robbins v. Taxing District*, supra. If the "taxable event" is the local activity delivery, Arkansas could not collect the tax because of the violation of the Due Process Clause of the Fourteenth Amendment. *Union Refrigerator Transit Co. v. Kentucky*, supra. There are no other "taxable events" here.

Therefore the purchaser is not liable for the tax. Under no condition could the seller be held accountable, for there are no decisions by the United States Supreme Court requiring foreign corporations to collect the type of tax herein involved where they employ only travelling salesmen to solicit orders subject to confirmation at the home office.

In any event, the Arkansas Supreme Court has not construed its taxing acts to include the transactions herein involved. This question was raised and urged below and the case is now properly remandable for this clarification. *Standard Oil Co. of California v. Johnson*, 316 U. S. 481;

Query v. U. S., 316 U. S. 486; *Patterson v. Alabama*, 294 U. S. 600; *Minn. v. National Tea Company*, 309 U. S. 551.

McGoldrick v. Berwind-White points out there is no distinction between a tax on property and the sum of the rights and powers incorporated to ownership and the taxation of the exercise of some of its constituent elements. *Henneford v. Silas Mason Co.*, 300 U. S. 577; *Nashville C. St. L. R. Co. v. Wallace*, 288 U. S. 249. If coal was so situated as to be subject to a state property tax (*Brown v. Houston*, supra; *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577) the transfer or purchase was equally as taxable as the storage or use. In other words, since there was no prevailing general ad valorem personal property tax, (which Arkansas has), the tax could be levied. If the tax is a property tax the local courts should construe its validity.

We urge that the judgment of the Supreme Court of Arkansas should be affirmed in holding that a sales tax levied and collected under the facts herein, violated the Commerce Clause, and that in addition the Due Process Clause is violated.

Respectfully submitted,

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FIL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas, Petitioner,

VS.

J. E. DILWORTH and RIECHMAN-CROSBY COMPANY, Respondents.

SEPARATE BRIEF FOR RESPONDENT, RIECHMAN-CROSBY COMPANY

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January 18, 1944.

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CASES CITED

STATUTES CITED

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POINT I-b. THE *BERWIND-WHITE* DECISION DOES NOT OVERRULE, OR IMPINGE UPON, PRINCIPLES DECLARED AND SETTLED IN THE *SONNEBORN CASE*, AND CASES OF SIMILAR IMPORT.

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POINT III. THE ARKANSAS SUPREME COURT HAS NOT DECIDED THE LOCAL QUESTIONS INVOLVED.

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POINT I-a. ALL OF THE TRANSACTIONS HERE INVOLVED CONSTITUTE INTERSTATE COMMERCE, IN ITS VERY ESSENCE; AND TO TAX SUCH TRANSACTIONS, OR ANY INTEGRAL PART THEREOF, WOULD BURDEN THE COMMERCE.

POINT I-b. THE *BERWIND-WHITE* DECISION DOES NOT OVERRULE, OR IMPINGE UPON, PRINCIPLES DECLARED AND SETTLED IN THE *SONNEBORN CASE*, AND CASES OF SIMILAR IMPORT.

The transactions sought to be taxed in this case constitute interstate commerce. In view of the decision of this court in *Sonneborn vs. Cureton*, 262 U. S. 506, 43 Sup. Ct. 646, this proposition is not, and could not be, challenged. One of the categories of sales therein involved were sales of oil which, when sold, was not in Texas. Mr. Chief Justice Taft said:

> "Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from taxation. They were in fact contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate in its essence and any state tax upon it is a regulation of it and a burden upon it."

True it is that the tax officials in the *Sonneborn case* had not attempted to tax such interstate sales. Nevertheless their restraint was explicitly declared to be constitutionally imperative. We are further aware that in the majority opinion in the *Berwind-White Case* the quoted statement was called "obiter." Regardless thereof, however, it was seemingly made deliberately, had supporting authority and should be taken in connection with prior statements which afforded genuine protection to sales of like character.

In the *Sonneborn case*, the contract "for the sale and delivery of the oil across state lines" was made by seller in an established place of business in Texas. In the case at bar the contracts of sale were made in Tennessee, where the title to the merchandise passed and immediate delivery thereof, in one category actual, and in the other two constructive, was accomplished.

In *Furst vs. Brewster*, 282 U. S. 493, 51 S. C. 295, Mr. Chief Justice Hughes, referred to and again approved the following language used by Judge Sanborn (Walter H., 8th C. C. A.):

> "All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

Mr. Chief Justice Hughes further said:

> "Such commerce comprehends all the component parts of commercial intercourse between different states, and, according to established principle, any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause."

In the *Furst case*, in pursuance of orders sent by Brewster, in Arkansas to Furst in Illinois, goods were shipped to the purchaser in Arkansas from the warehouse of Furst in Tennessee. Brewster failed to pay for the goods and Furst sued to recover on the contract. Brewster defended on the ground that the contract of sale was, in reality, made with a corporation which had not complied with an Arkansas statute relating to "doing business" by a foreign corporation in Arkansas, and, therefore, could not enforce the contract. Thereby, the commerce clause became involved. The Chief Justice, after stating, "these transactions were clearly in interstate commerce," further said:

> "Accordingly, when a corporation goes into a state other than that of its origin to collect, according to

> the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose."

If an act of the state designed to prevent the enforcement of, or otherwise burdening, a transaction or contract protected by the commerce clause, be held invalid for that reason, then, seemingly, it would necessarily follow that any state tax, of whatsoever kind or character, laid on the right to complete, or any activity necessary to the completion of, the contract by delivery of the goods contracted to be sold, wheresoever, or howsoever, made, would likewise fall within the ban.

However, it is argued by counsel for petitioner that the tax here imposed by the state statute does not burden interstate commerce. He says:

> "It is apparent that in considering the taxes involved in this case, the question of their validity under the interstate commerce clause of the Federal Constitution depends upon whether the taxes, as levied, discriminate against or burden interstate commerce."

Reliance is placed on the decision of this court in *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388. Of course, the opinion therein must be construed in the light of its factual setting. The facts are unrelated to, and wholly different from, the facts in the instant case.

Therein, the Coal Company maintained an established office in the City of New York, in which it conducted the

business of selling coal to customers within the city. Contracts of sale were negotiated at such office and obligated the seller to make deliveries of coal at the plants of the purchasers within the limits of the city. Every activity connected with the sales was conducted within the city, so that the taxable event occurred wholly within city limits. It was held that the fact that the coal company moved the coal in interstate transportation in order to bring it within the city for subsequent delivery under its contracts would not make the sale and delivery thereof within the city interstate commerce within the purview of the commerce clause.

In the case at bar neither the taxable event, nor any component part of it, occurred in Arkansas. To the very contrary, all of the contracts were made in Tennessee and were fully executed and performed in that state. In the *Riechman-Crosby case*, $87,230.99 of the sales involved were made on orders secured by traveling salesmen, or solicitors, of the company, subsequently accepted in Memphis, followed by deliveries to carrier, f. o. b. Memphis; $140,415.03 in sales originated by mail orders forwarded to Company, followed by acceptance and delivery to a common carrier in Memphis; and $13,669.69 of sales were made directly to residents of Arkansas, who drove trucks to the place of business of the Riechman-Crosby Company, purchased the goods, took actual possession thereof, and subsequently transported them into Arkansas in their own trucks. In each and all of such transactions, the title to, and possession of, the property passed to the purchaser in Memphis, thereby completing the sales transaction. Thereafter, the seller was no longer concerned in the transaction, and became entirely disassociated from it before the goods ever crossed the state

line into Arkansas. These conceded facts place the case at bar entirely beyond and without the purview of the *Berwind-White* decision.

Petitioner contends, however, that the sales so made were in reality made to citizens in Arkansas, and that the sales contracts contemplated an interstate movement of the goods out of Tennessee into Arkansas. It is further contended that the delivery of the goods by the common carrier to the purchaser in Arkansas was, under the statute, a component part of the taxable event, so as to bring the transaction within the terms of the Arkansas statute.

The *Berwind-White* case should neither be construed or applied, as counsel seeks to have done, by lifting from the context of the majority opinion the statement that, "the tax is conditioned upon a local activity * * * delivery of the goods within the state upon their purchase for consumption." The quoted statement provides neither the corner stone for, or foundation of, the decision. To so apply it is to distort the substance of it. To the very contrary, the basic facts, other statements in the opinion, and, more especially, express recognition of that provision of the enabling act itself requiring that both the order for the goods and subsequent delivery thereof must take place within the city limits form the predicate for the conclusion reached and show that the decision is confined to sales which are the product of both agreements and deliveries made within the taxing limits. Otherwise, the very plain restrictive limits of the enabling act that it "shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of the city, notwithstanding that some act be necessarily performed with respect to such trans-

action within such limits," (thus requiring that both the order for goods and the subsequent delivery thereof must occur within the taxing area) must be utterly disregarded and thrown into the discard. If, as counsel argues, the taxable event was delivery in the city, after termination of the interstate journey, and it was this sole activity which conditioned the tax, why the necessity for reciting the facts showing maintenance of a place of business within the city, the making of the contracts therein, and the *agreement* to make delivery therein? Moreover, and regardless of how one may speculate or anticipate what should, or may, be now decided in the circumstances here presented, where the state seeks to apply a tax to a delivery in pursuance of a contract of sale and purchase made and fully consummated in a sister state, nevertheless, we yet contend, with some degree of assurance, that the *Berwind-White case* did not involve, and is not decisive of, that particular question, and, therefore, prior decisions are of controlling force.

There are two answers to counsel's contention that the taxable event is delivery of the goods to the purchasers in Arkansas. The first is that the sales contracts were made in Tennessee, were fully consummated therein and the title of the goods there passed to the purchasers, on actual delivery to *him*, or his carrier agent. This, of course, raises the question of the extra-territorial application of the Arkansas statute. However, the Supreme Court of Arkansas did not pass on this question and this court is not presently concerned with it.

The second answer is that if delivery by the carrier to the consignee in Arkansas be treated as a component part of the sales transaction, thereby giving the trans-

action an interstate character, then the taxing statute imposes an undue burden on interstate commerce in violation of the commerce clause. For the purpose of this question, it is necessary to assume that the state statute is applicable to the entire transaction. The gravamen of the case, then, would turn on burdens imposed by the statute on interstate commerce, and this requires consideration of the various provisions of the statute.

The proposition may be stated as follows: If the state has the power to tax extra-territorial sales and to force the sellers to become its agents for the collection of the tax, the state would also have the power to prescribe the duties to be performed by its agents and to require them to comply with the statutory provisions which safeguard the collection of the tax and its remittance to the state. Turning then to the act, it will be seen that the provisions thereof in this respect are so drastic that they would place an onerous burden on interstate commerce, and, in some circumstances, would deter such commerce entirely.

Section 6 of the taxing statute provides:

> "It shall be the duty of every taxpayer required to make a return and pay any tax under this act to keep and preserve suitable records of the gross receipts or gross proceeds of sales taxable and non-taxable under this act, including such books of account and such analyses of sales as may be necessary to determine the amount of tax due hereunder, and all invoices, credit memoranda, refund slips, and other records of goods, wares, merchandise, and other subjects of taxation under this act as will substantiate and prove the accuracy of such returns. All such records shall remain in Arkansas and be preserved for a period of three (3) years, and shall be

open to examination at any time by the commissioner. In the event that such records are kept outside of the State of Arkansas in the usual course of business they shall be produced in the State of Arkansas upon proper demand by the Commissioner within a period of fifteen (15) days after receipt of such demand. * * *

"It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Commissioner or Revenue or by any of his duly authorized agents while engaged in checking or auditing the records of any person making such sale for resale. All such records of sales for resale shall remain in Arkansas and shall be preserved for a period of three (3) years, and shall be open to examination at any time by the Commissioner or by any of his duly authorized agents." (Appendix to petition, page 42.)

As is apparent, this section requires a non-resident merchant to keep a record of all sales made by him, not only those which are taxable under the act, but those which are not taxable, together with all invoices, credit memoranda, refund slips, and other records of goods, wares and merchandise that are the subject of taxation under the act. Moreover, the non-resident seller is required to produce all of his records in the State of Arkansas for examination by the state authorities whenever a demand for such production is made on him by the Commissioner of Revenues. Seemingly, it would necessarily follow that if non-resident merchants were required to keep their records in the manner prescribed by the statute, and produce them in Arkansas whenever a demand therefor be made, as a condition to the right to sell goods to Arkansas purchasers, they would probably prefer not to make the sales. Unless the volume of sales was ex-

tremely large the cost of keeping and sending such records to Arkansas for examination might exceed the profits. This would not only create a burden on interstate commerce, but would be an absolute deterent of such commerce.

Ten of thousands of residents of Arkansas purchase goods from mail order houses in St. Louis, Chicago and New York, who order by catalogue and to whom delivery is made by parcel post, or otherwise. If petitioner's contention be sound, these mail order houses must necessarily keep their records in compliance with the taxing statute, and must collect and remit the tax as the statute requires.

The taxing statute goes much further than indicated. Section 12 thereof provides that "it shall be unlawful for any taxpayer to engage or transact business within this state unless a resident permit or permits shall have been issued to him. Section 19 provides that "any taxpayer who continues to do business after the effective date of this act * * * without first obtaining a permit shall be guilty of a misdemeanor punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment." (Appendix to petition, pages 51 to 57.)

It may be contended that these provisions would not be applicable to non-resident sellers; but this is just another way of saying that the taxing act is not applicable to them, for the act makes no distinction between local and non-resident sellers in this respect, and if it applies to the latter at all, it applies to them in its entirety. In

any event, the requirement of a permit to make taxable sales, and the provision that sales made without a permit shall constitute a crime punishable by fine or imprisonment or both would lay a prohibitive embargo on interstate commerce in its application to extra-territorial sellers.

Petitioner contends that the imposition of this burden on interstate commerce is justified by the decision of this court in *Felt & Tarrant Mfg. Co. vs. Gallagher*, 306 U. S. 62, 59 Sup. Ct. 376, in which it was held that the manufacturing company, an Illinois corporation, could be lawfully required to collect the California use tax. Therein, the manufacturer of comptomotors leased an office in California and employed a general agent in that state to negotiate sales of its machines in certain designated territory in the state. It was held that the statute which required the seller, in the circumstances of that case, to collect the tax for the benefit of the state imposed no unconstitutional burden on interstate commerce.

Petitioner apparently concedes that the State of Arkansas could not enforce the collection provisions of its taxing statute beyond its own border but further contends that the lack of power to enforce the statute extraterritorially is not a desideratum in measuring the statute with the yardstick of the commerce clause. In our opinion, this merely begs the question, for in effect it says that if the statute cannot be enforced beyond the border of the state it cannot impose a burden on interstate transactions. Obviously, then, if that were the case, no question would arise under the commerce clause. However, for the purpose of this suit it must be assumed that the statute is applicable to interstate commerce, and the

question really presented is whether or not it imposes an undue burden on that commerce.

POINT II. INSOFAR AS INTERSTATE COMMERCE IS CONCERNED, THERE CANNOT BE ANY VITAL DISTINCTION BETWEEN A LICENSE TAX OR A TAX OF ANY OTHER CHARACTER. IF EITHER CONSTITUTES A BURDEN ON COMMERCE, IT IS INVALID.

Counsel says that the doctrine announced by this court in *Crenshaw vs. Arkansas*, 227 U. S. 389, 33 S. C. 294, and cases of similar import, are inapposite here for the reason that such cases involved a license, or occupational, tax on solicitation of orders in interstate commerce. However, as we view it, if it be held that the levy of a tax on the privilege of soliciting orders to be subsequently fulfilled by shipment of goods from one state to another, in final fulfillment of the contract, which is but the initial step in such commerce, but which comprises an integral part of the whole, does in and of itself burden interstate commerce, then it ought to necesarily follow that any tax, or burden laid on the delivery thereof within the state—the final consummation of the transaction—would have the same effect. If, as said in the *Crenshaw case*, the "business" of soliciting orders, and the fulfillment of such orders, is interstate commerce, and the privilege of doing it cannot be taxed, then by the same token, if a privilege tax is laid on the solicitation would constitute a burden, any tax, privilege or otherwise, laid on the consummation of it by delivery would constitute a burden.

The decision in the *Berwind-White case* does not preclude application of the principle of the *Crenshaw case*

to the instant case. It may be conceded that by virtue of the *Berwind-White* decision, the rule deduced from the *Robbins* and *Crenshaw cases* is "narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate." Furthermore, "the actual and potential effect on the commerce of such a tax" was wholly wanting in the *Berwind-White case* for the obvious reason that the factual setting did not involve it. But, in the instant case, solicitation of such orders, under the aegis of the commerce clause, constituted the first and most important link in the chain, and formed the predicate for subsequent acceptance and fulfillment of the order, which is also protected, without let or hindrance on the part of the state, under the commerce clause. The point we endeavor to impress is that if the solicitation of the order, the subsequent fulfillment of which contemplates and requires interstate commerce, be protected, then, the acceptance and fulfillment thereof must likewise have protection, for, as said in the *First case*, supra:

> "Accordingly, when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose."

Likewise, when a corporation accepts an order for the sale of merchandise originating in a sister state, to make delivery of goods to the purchaser at the domicile of the corporation, the state of origin cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purchase.

Regulations promulgated by the commissioner (No. 16 —Act 154, and No. 270—Act 386) do not provide for the collection of the tax on merchandise, possession of which, actual, as distinguished from constructive, is obtained by purchaser at a point outside the state and thereafter by him brought into the state and used; and counsel for petitioner has continuously maintained that the tax may be made to apply only in those instances "where possession (physical) of the merchandise is obtained in this state by the purchaser and the merchandise is to be used in this state." In these circumstances, therefore, according to counsel, activities which involve (1) the purchase of merchandise in Memphis, followed by (2) taking of the actual physical possession thereof in Memphis, and (3) the immediate transportation of it into Arkansas by the purchaser, does not provide a "taxable event," within the purview of the taxing act. We presume the commerce clause provides the barrier. But, in any event, the distinction which he endeavors to draw and sustain rests wholly on what he deems the line of demarcation between a delivery of the actual physical possession to the purchaser in Memphis, followed by subsequent transportation by him into Arkansas, on the one hand, and a delivery by the seller to the carrier agent of the purchaser — constructive possession — on the other. The distinction seems rather more fanciful than real, and without bearing, force or effect when one endeavors to determine whether either transaction is interstate commerce.

POINT III. THE ARKANSAS SUPREME COURT HAS NOT DECIDED THE LOCAL QUESTIONS INVOLVED.

If, as counsel contends, "the tax is laid upon the purchaser for consumption," as we have heretofore contended, the tax would not be valid under Arkansas law, it being conceded that Arkansas does not have a law providing for a "use tax."

Moreover, Respondents have heretofore contended, and yet contend, (1) that the taxing statutes do not purport to cover extra-territorial sales; (2) that upon termination of the inter-state movement into Arkansas, any tax laid on the *right* of the purchaser (owner) to receive the property would violate the uniformity provision of the state constitution; and, (3) any tax in the nature of a "use tax" would not be valid under the state constitution. For reasons not disclosed the State Supreme Court pretermitted decision of these vital questions, and preferred to place the opinion entirely on the commerce clause. In these circumstances, therefore, if this court should hold that the tax does not offend under the commerce clause, then, in order that respondents may have their day in court on the very vital questions presented to, but not decided by, the State Supreme Court, remand should be made accordingly.

> *State of Minnesota vs. National Tea Co.*, 309 U. S. 551, 60 S. C. 676;
> *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506, 58 S. C. 295.

This court, on remand of the *Berwind-White case*, ordered as follows:

> "In two instances already noted, respondents contracts with Austin Nichols and Company and with the New England Steamship Company called for delivery of the coal at points outside New York, in the one case f. o. b. at the mines in Pennsylvania, in the

other at the pier in Jersey City, N. J., and deliveries were made accordingly. Respondents asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon "any transaction originating and/or consummated outside of the territorial limits of the city." * * * This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.

"Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

Respectfully submitted,

W. H. DAGGETT,
Counsel for Respondent,
Riechman-Crosby Company;

C. E. DAGGETT, Of Counsel,
Daggett Building,
Marianna, Arkansas.

January 18, 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 311.—OCTOBER TERM, 1943.

Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, Petitioner, *vs.* J. E. Dilworth Company and Reichman-Crosby Company.	On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[May 15, 1944.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

We are asked to reverse a decision of the Supreme Court of Arkansas holding that the Commerce Clause precludes liability for the sales tax of that State upon the transactions to be set forth.

respondents

We take the descriptions of these transactions from the opinion under review. The ~~petitioners~~ are Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State. Orders for goods come to Tennessee ~~either~~ through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, ~~or~~ by mail or telephone. But no matter how ~~the~~ order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas.

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For such sales, the Supreme Court of Arkansas had held, in 1939, the State had no power to exact a sales tax, *Mann* v. *McCarroll*, 198 Ark. 628. The Arkansas legislation then in force was Act 154 of 1937. The transactions on which the Collector here seeks to tax extended over periods that bring into question Act 154 (extended by Act 364 of 1939) and a new Statute (Act 386 of 1941), known as the Gross Receipts Act. The Arkansas Su-

preme Court gave the Act of 1941 the same scope and significance as it attributed to the Act of 1937, that is, an act imposing a retail sales tax and not a use tax. In view of this construction, it adhered to its earlier decision in *Mann* v. *McCarroll,* finding nothing in our intervening decision in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, requiring a change in its constitutional views. 205 Ark. 780. To permit further examination of the complicated problems raised by the interplay of federal and state powers we brought the case here. 320 U. S. 728.

We agree with the Arkansas Supreme Court that the *Berwind-White* case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. A boundary line is none the worse for being narrow. Once it is recognized, as it long has been by this Court, that federal and state taxation do not move within wholly different orbits, that there are points of intersection between the powers of the two governments, and that there are transactions of what col~~loquially may be deemed~~ a single process ~~across state lines which~~ may yet be taxed by the State of their occurrence, "nice distinctions are to be expected". *Galveston, Harrisburg, &c. Ry. Co.* v. *Texas*, 210 U. S. 217, 225. The differentiations made by the court below ~~between this case~~ and the *Berwind-White* case are relevant and controlling. "The distinguishing point between the Berwind-White Coal case and the cases at bar ~~said the court below~~ is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ." 205 Ark. at 786. This, according to practical notions of what constitutes a sale which is reflected by what the law deems a sale, constituted a sale in New York and accordingly we sustained a retail sales tax by New York. Here, as the Arkansas Supreme Court continued, "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." Because the relevant factors in the two cases decided together with the *Berwind-White* case were the same as those in *Berwind-White*, the decision in that case controlled the two other cases. "In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city

and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwihd-White Company* case." *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70, 77. In *Berwind-White* the Pennsylvania seller completed his sales in New York; ~~and~~ in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction. &

It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to ~~impose such a use~~ tax, as it. ~~Supreme Court so~~ emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences ~~between these transactions~~ and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

in the basis of these two taxes

The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable

to a tax upon the sale itself." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it." *Wagner* v. *City of Covington*, 251 U. S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

A very different situation underlay *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The Wisconsin Supreme Court and this Court were concerned with an exaction on ~~the same~~ transaction which the Wisconsin Court described one way and we another. We looked behind the labels to the thing described, and the thing—taxation of the distribution of income earned in Wisconsin—did not offend the Federal Constitution. That case affords no ground for rejecting the deliberate choice of a State to impose a tax on a transfer of ownership ~~where the transfer was made beyond the State limits~~ and sustaining it as a use tax on that property because the State might, so far as the Federal Constitution is concerned, have enacted a use tax and such a use tax might have been collected on the enjoyment of the goods so sold. Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the area of free trade among the States.

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, where the transfer was made beyond the State limits,

Judgment affirmed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MURPHY concur, dissenting.

The present decision marks a retreat from the philosophy of the *Berwind-White* case, 309 U. S. 33. It draws a distinction between the use tax (*Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62) and the sales tax which on the facts of this case seems irrelevant to the power of Arkansas to tax. And it is squarely opposed to *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70, which should be overruled if the present decision goes down.

Felt & Tarrant Co. v. *Gallagher* involved a use tax. The State of the buyer (California) was allowed to exact the tax from the

Illinois seller for goods sold to California buyers though the seller's activities in California were not different in quality and hardly more numerous than the Arkansas activities of the Tennessee sellers in the present case. Though in some cases deliveries were made by the local agent for Felt & Tarrant, in others shipments were made by it from Illinois direct to the buyers in California. And in that case, as in the present case, the orders were accepted outside the State of the buyer and remittances were made direct to the out-of-state seller.

In *McGoldrick* v. *Felt & Tarrant Co.* we allowed New York City to collect its sales tax on sales which Felt & Tarrant made to New York purchasers under substantially the same course of dealing as obtained in case of the California use tax. Moreover, there were other transactions in *McGoldrick* v. *Felt & Tarrant* which were even closer to the sales in the present case. I refer to the sales to New York City buyers by a Massachusetts corporation (Du Grenier, Inc.) which was not authorized to do business in New York and which had no employee there. Another company, Stewart & McGuire, Inc., acted as its exclusive agent and solicited orders in New York City. The orders were forwarded to Massachusetts where they were accepted. Shipments were made by rail or truck (F. O. B. Haverhill, Mass.) to the purchaser in New York City, who paid the freight. Yet we allowed New York City to collect its sales tax on those transactions.

If the federal Constitution does not prohibit New York City from levying its sales tax on the proceeds of those interstate transactions or California from exacting its use tax at the final stage of an interstate movement of goods, I fail to see why Arkansas should be prohibited from collecting the present tax.

It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. We stated as much in the *Berwind-White* case where, in speaking of the sales tax, we said (309 U. S. p. 49): "It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of

whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce," citing use tax cases including *Henneford* v. *Silas Mason Co.* and *Felt & Tarrant Co.* v. *Gallagher.*

The sales tax and the use tax are, to be sure, taxes on different phases of the interstate transaction. We may agree that the use tax is a tax "on the enjoyment of that which was purchased." But realistically the sales tax is a tax on the receipt of that which was purchased. For as we said in the excerpt from the *Berwind-White* case quoted above, it is the "transfer of possession to the purchaser within the state" which is the "taxable event regardless of the time and place of passing title." And *McGoldrick* v. *Felt & Tarrant Co.* makes plain that the transfer of possession need not be by the seller, for in that case, as in the present one, deliveries were made by common carriers which accepted the goods F. O. B. at points outside the State. In terms of state power receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

It is no answer to say that the Arkansas sales tax may not be imposed because the out-of-state seller was "through selling" when the tax was incurred. That was likewise true of both the use tax cases, including *General Trading Co.* v. *State Tax Commission,* decided this day, and the sales tax decision in *McGoldrick* v. *Felt & Tarrant Co.* The question is whether there is a phase of the interstate transaction on which the State of the buyer can lay hold without placing interstate commerce at a disadvantage. There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them. I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable

event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics. If that is not done, I think we should retreat from the view that interstate commerce should carry its fair share of the costs of government in the localities where it finds its markets and adopt the views expressed in the dissent in the *Berwind-White* case.

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SUPREME COURT OF THE UNITED STATES.

Nos. 311, 441, 355.—October Term, 1943.

Murray B. McLeod, Commissioner of Revenue of the State of Arkansas, Petitioner, 311 *vs.* J. E. Dilworth Company and Reichman-Crosby Company.	On Writ of Certiorari to the Supreme Court of the State of Arkansas.
General Trading Company, a Corporation doing business as Minneapolis Iron Store, Petitioner, 441 *vs.* State Tax Commission of the State of Iowa.	On Writ of Certiorari to the Supreme Court of the State of Iowa.
International Harvester Company and International Harvester Company of America, Appellants, 355 *vs.* Department of Treasury of the State of Indiana, et al.	On Appeal from the Supreme Court of the State of Indiana.

[May 15, 1944.]

Mr. Justice Rutledge.

These three cases present in various applications the question of the power of a state to tax transactions having a close connection with interstate commerce.

In No. 311, *McLeod* v. *J. E. Dilworth Company*, Arkansas has construed its tax to be a sales tax, but has held this cannot be applied where a Tennessee corporation, having its home office and place of business in Memphis, solicits orders in Arkansas, by mail, telephone or sending solicitors regularly from Tennessee, accepts the orders in Memphis, and delivers the goods there to the carrier for shipment to the purchaser in Arkansas. This Court holds the tax invalid, because "the sale—the transfer of ownership—was

made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." Though an Arkansas "use tax" might be sustained in the same situation, "we are not dealing with matters of nomenclature even though they be matters of nicety." And the case is thought to be different from the *Berwind-White* case, 309 U. S. 33, where New York City levied the tax, because, in the Arkansas court's language, "the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ."

On the other hand, in No. 441, *General Trading Company* v. *State Tax Commission*, Iowa applies its "use tax" to a transaction in which a Minnesota corporation ships goods from Minnesota, its only place of business, to Iowa purchasers on orders solicited in Iowa by salesmen sent there regularly from Minnesota for that purpose, the orders being accepted in Minnesota. This tax the Court sustains. While "no state can tax the privilege of doing interstate business, . . . the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. . . . None of these infirmities affects the tax in this case. . . ." And the foreign or nonresident seller who does no more than solicit orders in Iowa, as the Tennessee seller does in Arkansas, may be made the state's tax collector.

In No. 355, *International Harvester Company* v. *Indiana*, the state applies its gross income tax, among other situations, to one (Class D) where a foreign corporation authorized to do and doing business in Indiana sells and delivers its product in Indiana to out-of-state customers who come into the State for the transaction. The Court sustains the tax as applied.

I.

For constitutional purposes, I see no difference but one of words and possibly one of the scope of coverage between the Arkansas tax in No. 311 and the Iowa tax in No. 441. This is true whether the issue is one of due process or one of undue burden on interstate commerce. Each tax is imposed by the con-

suming state. On the records here, each has a due process connection with the transaction in that fact and in the regular, continuous solicitation there. Neither lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transaction for separate or special treatment. In each instance therefore interstate and intrastate business reach these markets on identical terms, so far as the effects of the state taxes are concerned.

And in my opinion they do so under identical material circumstances. In both cases the sellers are "nonresidents" of the taxing state, foreign corporations. Neither seller maintains an office or a place of business there. Each has these facilities solely in the state of origin. In both cases the orders are taken by solicitors sent regularly to the taxing state for that purpose. In both the orders are accepted at the home office in the state of origin. And in both the goods are shipped by delivery to the carrier or the post in the state of origin for carriage across the state line and delivery by it to the purchaser in his taxing state.

In the face of such identities in connections and effects, it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is a will-o'-the-wisp, insufficient to crux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a "sales tax." Iowa calls hers a "use tax." This court now is committed to the validity of "use" taxes. *Henneford* v. *Silas Mason Company, Inc.*, 300 U. S. 577; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Similarly, "sales taxes"

on "interstate sales" have been sustained. In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, such a tax applied by the state of the market was upheld. Compare *Banker Brothers Company* v. *Pennsylvania,* 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169. Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435. The difference may be important for the scope of the statute's application, that is, whether it is intended to apply to some transactions but not to others that are within reach of the state's taxing power. It hardly can determine whether the power exists.

II.

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes place upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. *e. g., Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though

overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state, the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state."[1] The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

That is true, if labels are not to control, unless something which happens or may happen outside the taxing state operates in the

[1] Cf. Frene v. Louisville Cement Co., 134 F. 2d 511 (App. D. C.).

one case to defeat the jurisdiction, but does not defeat it in the other.

As I read the Court's opinion, though it does not explicitly so state, the Arkansas tax falls because Tennessee could tax the transaction and, as between the two states, has exclusive power to do so. This is because "the sale—the transfer of ownership—was made in Tennessee." Arkansas' relation to the transaction is constitutionally different from that of New York in the *Berwind-White* case, though both are the state of the market, because the Berwind-White Company "maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City." This "constituted a sale in New York and accordingly we sustained a retail sales tax by New York." So here the company's "offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce . . ." The inevitable conclusion, it seems to me, is that the Court is deciding not only that Arkansas cannot tax the transaction, but that Tennessee can tax it and is the only state which can do so. To put the matter shortly, Arkansas cannot levy the tax because Tennessee can levy it. Hence "for Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This statement of the matter appears to be a composite of due process and commerce clause ideas. If so, it is hard to see why the same considerations do not nullify Iowa's power to levy her tax in the identical circumstances and vest exclusive jurisdiction in Minnesota to tax those transactions. For in the Iowa case the selling corporation maintains its office and place of business in Minnesota, accepts the orders there, and the delivery, which is to carrier or post, is consummated, so far as the record shows, exactly in the manner it is made in the Tennessee-Arkansas transaction. If these facts nullify Arkansas' power to tax the transaction by vesting exclusive jurisdiction in Tennessee, it would seem *a fortiori* they would nullify Iowa's power and give Minnesota exclusive jurisdiction to tax the transactions there involved. Unless the sheer difference in the terms "sale" and "use," and whatever difference these might make as a matter of legislative selection of the transactions which are to bear the tax, are to control

upon the existence of the power to tax, the result should be the same in both cases.

Merely as a matter of due process, it is hard to see why any of the four states cannot tax the transactions these cases involve. Each has substantial relations and connections with the transaction, the state of market not less in either case than the state of origin. It "sounds better" for the state of origin to call its tax a "sales tax" and the state of market to name its tax a "use tax." But in the *Berwind-White* case the latter's "sales tax" was sustained, where it is true more of the incidents of sale conjoined with the location of the place of market than do in either No. 311 or No. 441. If this is the distinguishing factor, as it might be for selecting one of the two connected jurisdictions for exclusive taxing power, it is not one which applies to either of these transactions. The identity is not between the *Dilworth* case and *Berwind-White*. It is rather between *Dilworth* and *General Trading* with *Berwind-White* differing from both. And, so far as due process alone is concerned, it should make no difference whether the tax in the one case is laid by Arkansas or Tennessee and in the other by Iowa or Minnesota. Each state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise or on account of ideas of territorial sovereignty concerning occurrence of "taxable incidents" within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power. Whether it exerts this by selecting for "impingement" of the tax some feature or incident of the transaction which it denominates "sale" or "use" is both illusory and unimportant in any bearing upon its constitutional authority as a matter of due process. If this has any substantive effect, it is merely one of legislative intent in selecting the transactions to bear the tax and thus fixing the scope of its coverage, not one of constitutional power. "Use" may cover more transactions with which a state has due process connections than "sale." But whenever sale occurs and is taxed the tax bears equally, in final incidence of burden, upon the use which follows immediately upon it.

The great difficulty in allocating taxing power as a matter of due process between the state of origin and the state of market arises from the fact that each state, considered without reference

to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure, as well as from the terms in which statutes not directed specifically to reaching these transactions are cast, comes the search for some "taxable incident taking place within the state's boundaries" as a hook for hanging constitutionality under due process ideas. "Taxable incident" there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not "tax an interstate transaction" is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the "sale" or on the "use," by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions. That Tennessee therefore may tax this transaction by a sales tax does not, in any proper conception of due process, deprive Arkansas of the same power.

III.

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 55-56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton v. Missouri*, 91 U. S. at 275; *Guy v. Baltimore*, 100 U. S. 434; *Voight*

v. *Wright*, 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.[2]

In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or "use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of "jurisdiction" under due process conceptions. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes.

[2] Cf. the opinion of the Chief Justice in Northwest Airlines, Inc. v. Minnesota, No. 33, decided this day.

441 The Iowa tax in No. [redacted] avoids this problem by allowing credit for any sales tax shown to be levied upon the transaction whether in Iowa or elsewhere. Clearly therefore that tax cannot in fact put the interstate transaction at a tax disadvantage with local trade done in Iowa or elsewhere.[3]

However, the Arkansas tax in No. [redacted] provides for no such
311 credit. But in that case there is no showing that Tennessee actually imposes any tax upon the transaction. If there is a burden or clog on commerce, therefore, it arises from the fact that Tennessee has power constitutionally to impose a tax, may exercise it, and when this occurs the cumulative effect of both taxes will be discriminatorily burdensome, though neither tax singles out the transaction or bears upon it more heavily than upon the local trade to which it applies. In short, the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.

In my opinion this is the real question and the only one presented in No. 311. And in my judgment it is determined the wrong way, not on commerce clause grounds but upon an unsustainable application of the due process prohibition.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.

As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts. That the decision is cast more largely

[3] Cf. text *infra* at note 4 *et seq.*

in terms of due process than in those of the commerce clause does not nullify that effect.

If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin.[4] The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the commerce clause as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for application of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been made, it should go in favor of Arkansas, not Tennessee.

For all practical purposes Indiana's gross income tax in No. 355 may be regarded as either a sales tax or a use tax laid in the

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[4] Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; compare Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434; J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307.

state of market, comparable in all respects (except in words) to the Arkansas tax laid in No. 311 and to the Iowa tax imposed in No. 441, except that here the seller as well as the buyer does business and concludes the transaction in Indiana, the state of the market. This is clearly true of Classes C and E. It is true also of Class D, in my opinion, although the buyer there resided in Illinois but went to Indiana to enter into the transaction and take delivery of the goods. That he at once removed them, on completion of the transaction there, to Illinois, intended to do this from the beginning and this fact may have been known to the seller, does not take from the transaction its character as one entered into and completed in Indiana. Whether or not Illinois, in these circumstances, could impose a use tax or some other as a property tax is not presented and need not be determined. If the Arkansas and Iowa taxes stand, or either does, *a fortiori* the Indiana tax stands in these applications.

Accordingly, I concur in the decisions in Nos. 441 and 355, but dissent from the decision in No. 311.